Petition

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No. ....

IN THE

Supreme Court of the United States

October Term, 1981

ROBERT J. GILLILAND, MARY P. FITZ, JAMES S. GILLILAND and FRANK M. GILLILAND,

Petitioners,

vs.

THE UNITED STATES,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS.

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Questions Presented.

1. Where the Air Force officially represents that a specific parcel of property near one of its airports is subject to such a large number of overflights, high level of jet noise, and serious hazard of jet crash that development should not be permitted, has the Air Force taken the property and become liable to pay just compensation to the owners?

2. Where the Air Force makes the representations noted in question #1 to local planning and zoning authorities, and the local authorities act on the Air Force's representations by denying the property owner the right to use his property, is the Air Force estopped to deny the truth of its representations in a later suit for just compensation?

TABLE OF CONTENTS

Page

Questions Presented i

Opinion Below 1

Jurisdiction 1

Suggestion That Consideration of This Petition Be Briefly Delayed Pending the Filing of Petitions in Two Companion Cases 3

Constitutional Provision Involved 4

Statement of the Case 4

Reasons for Granting the Writ 10

The Decision of the Court of Claims Conflicts With All Known Decisions Where the Evidence Shows Regular, Frequent, Noisy, Hazardous Overflights of Jet Aircraft 10

The Law Governing Estoppel Against the Government Needs This Court's Attention 11

Conclusion 16

INDEX TO APPENDICES

Appendix A. Opinion of the United States Court of Claims, Trial Division, No. 546-76 ..... App. p. 1

Appendix B. Order 31

Appendix C. Order 32

Appendix D. Appeal 33

Appendix E. Appeal 46

TABLE OF AUTHORITIES

Cases	Page
Aaron v. City of Los Angeles (1974) 40 Cal. App. 3d 471, 115 Cal. Rptr. 162, cert. den. (1975) 419 U.S. 1122	10
Aaron v. U.S. (Ct. Cl. 1963) 311 F. 2d 798	10
Ackerman v. Port of Seattle (1960) 55 Wash. 2d 500, 348 P. 2d 664	10
Agins v. City of Tiburon (1979) 24 Cal. 3d 266, aff'd in part (1980) 447 U.S. 255	4
A. J. Hodges Indus., Inc. v. U.S. (Ct. Cl. 1966) 355 F. 2d 592	10
Avery v. U.S. (Ct. Cl. 1964) 330 F. 2d 640	10
Bacon v. U.S. (Ct. Cl. 1961) 295 F. 2d 935	10
Brandt v. Hickel (9th Cir. 1970) 427 F. 2d 53	12, 14, 17
City of Burbank v. Lockheed Air Terminal, Inc. (1978) 411 U.S. 624	10
City of Jacksonville v. Schumann (Fla. Ct. App. 1967) 199 So. 2d 727	10
Ferguson v. City of Keene (1971) 111 N.H. 222, ... A. 2d 605	10
Gestuvo v. District Dir. (C.D. Cal. 1971) 337 F. Supp. 1093	12
Griggs v. Allegheny County (1962) 369 U.S. 84	10
Jankovich v. Indiana Toll Road Comm. (1965) 379 U.S. 487	10
Jensen v. U.S. (Ct. Cl. 1962) 305 F. 2d 444	10
Kaiser Aetna v. U.S. (1979) 444 U.S. 164	12, 17
Kent Homes, Inc. v. U.S. (D. Kans. 1967) 279 F. Supp. 650, aff'd (10th Cir. 1975) 512 F. 2d 395	12, 13, 14
Laird v. Nelms (1972) 406 U.S. 797	10

Page

Mapco, Inc. v. Carter (Temp. Em. Ct. App. 1978) 573 F. 2d 1268 16

Martin v. Port of Seattle (1964) 64 Wash. 2d 309, 391 P. 2d 540, cert. den. (1965) 379 U.S. 989 10

Monongahela Navigation Co. v. U.S. (1893) 148 U.S. 312 12

Nestle v. City of Santa Monica (1972) 6 Cal. 3d 920, 496 P. 2d 480 10

San Diego Gas & Elec. Co. v. City of San Diego (1981) ... U.S. 17

Schuster v. C.I.R. (9th Cir. 1962) 312 F. 2d 311 12

Schweiker v. Hansen (1981) ... U.S. ..., 67 L.Ed. 2d 685 11

Thornburg v. Port of Portland (1962) 233 Ore. 178, 376 P. 2d 100 10

United States v. Causby (1946) 328 U.S. 256 10

United States v. Georgia-Pacific Co. (9th Cir. 1970) 421 F. 2d 92 ..... 12, 14, 15, 16

United States v. Lazy F C Ranch (D. Ida. 1971) 324 F. Supp. 698 12

United States v. Pennsylvania Chem. Corp. (1973) 411 U.S. 655 12

United States v. 35.00 Acres of Land (W.D. Mo. 1962) 214 F. Supp. 792 ..... 12, 14

Walsonavich v. U.S. (3d Cir. 1964) 335 F. 2d 96 12

Constitution

United States Constitution, Fifth Amendment 4

Statute

United States Code, Title 28, Sec. 1255(1) 3

Textbook

3 Wiliams, American Land Planning Law (1975) Sec. 73.34, p. 388 5

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Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS.

The Petitioners (the Property Owners) respectfully pray that a Writ of Certiorari issue to review a judgment of the United States Court of Claims.

Opinion Below.

The Court of Claims issued no formal opinion. Its Order dated June 12, 1981 (App. B) affirmed and adopted the recommended decision of the trial judge filed September 25, 1980 (App. A).

Jurisdiction.

This inverse condemnation case is brought by the owners of 33.3 acres of vacant property located on the extended centerline of runway 4/22 (in what the Air Force describes

as an "Accident Potential Zone") at Air Force Plant 42 in Palmdale, California.

After a trial on the merits, the trial judge found that the Air Force had made the following representations about flight activity at Air Force Plant 42 privately and during 1973 hearings before the Palmdale City Council and the Los Angeles County Board of Supervisors. This Air Force testimony led the City and the County to deny zone changes which would have permitted use and development of the subject property:

- there were regular and frequent overflights of the subject property from Air Force Plant 42 (Findings 23, 24, 25, 28 and 30) (App. A, pp. 12-15);
- the flights from Plant 42 interfered with the Property Owners' ability to use and enjoy their property (Findings 18, 19, 23) (App. A, pp. 11, 12);
- the flights from Plant 42 inflicted extremely loud noise on the subject property (Findings 23, 24, 25, 28 and 30) (App. A, pp. 12-15).

Notwithstanding these findings, as well as the trial judge's reiteration in his opinion that the Air Force representations to the City and County officials were true (App. A, p. 3), the trial judge inexplicably concluded that there was no evidence of regular, frequent, noisy overflights which interfered with the use of the subject property (App. A, p. 3).

Though finding that Air Force officials truthfully testified at the 1973 hearings, the trial judge apparently refused to consider their testimony as establishing the factual basis for a taking.

The Property Owners excepted to the trial judge's findings, opinion and recommendation for conclusion of law. They urged that the Air Force's 1973 testimony conclusively established the elements of a taking, thus requiring a legal

conclusion that a taking had occurred, either because the facts were admitted by the Air Force, or the Air Force was estopped to deny the facts its officials had testified to before the City Council and the County Board of Supervisors because the Air Force's testimony caused the City and County to prohibit use of the subject property.

The Court of Claims declined to render an opinion. The trial judge's actions were simply affirmed and adopted.

The Order of the Court of Claims was filed June 12, 1981 (App. B). A timely Motion for Rehearing was denied October 2, 1981 (App. C). A copy of the trial judge's Opinion, together with his Findings of Fact and Conclusions of Law, is App. A.

This Court's jurisdiction is invoked pursuant to 28 USC §1255(1).

Suggestion That Consideration of This Petition Be Briefly Delayed Pending the Filing of Petitions in Two Companion Cases.

Because the claim against the Air Force could *only* be tried in the Court of Claims, and the City and County *could not* be sued there, no court — UNTIL NOW — has had the opportunity to examine the actions of ALL THREE governmental entities.

THIS COURT NOW HAS THAT OPPORTUNITY.

The City and County convinced the California state courts that their zoning, which prohibits any viable use of the subject property (so the City and County could donate it to the Air Force for a clear zone), does not constitute a taking of property. Moreover, they convinced the trial courts that damages *could* not be awarded in any regulatory case. The California Court of Appeal has just affirmed (see Apps. D and E), though, in the *City of Palmdale* case the California

Court of Appeal acknowledged that the foundation for the trial court's opinion (*i.e.*, the California Supreme Court's decision in *Agins v. City of Tiburon* [1979] 24 Cal. 3d 266, *aff'd in part* [1980] 447 U.S. 255) ". . . flatly contradicts clear precedent of United States Supreme Court cases." (App. D, p. 38).

Petitions for Hearing by the California Supreme Court will be filed in both cases in January, 1982. Given that Court's recent land use decisions, it is not anticipated that hearings will be granted. Thus, the *City* and *County* cases should be ripe for this Court's review by Certiorari by March, 1982.

It would seem prudent for this Court to delay action on the instant Petition pending receipt of the Petitions in the two related cases.

Constitutional Provision Involved.

Fifth Amendment, United States Constitution:

> ". . . nor shall private property be taken for public use, without just compensation."

Statement of the Case.

This case involves 33.3 acres of land owned by the Gillilands and Mrs. Fitz in Palmdale, California. The property is at the intersection of one of the City's main thoroughfares (Ave. P) and the main entrance to Lockheed's L-1011 manufacturing Plant (8th St.).

The Gilliland property is 2,800 feet from the boundary of Air Force Plant 42, and 8,300 feet from the end of Plant 42's runway 4/22, on the runway's extended centerline.

Plant 42 is owned and operated by the Air Force. It is used by civilian contractors for manufacturing military aircraft, experimental aircraft, and first flight testing of aircraft.

The contractors using Plant 42 are a who's who of the aviation fraternity. McDonnell-Douglas, Lockheed, Northrop, Rockwell International and Rockwell Space Division/ NASA have used Plant 42 to build, test, and store the A-4, F-104 and F-5 fighters, the SR-71 reconnaissance plane, the B-1 Bomber, the L-1011 and the Space Shuttle.

The Gilliland property is divided between two zoning jurisdictions: 5 acres are within the City of Palmdale, while 28.3 acres are within the jurisdiction of Los Angeles County. In 1973, the Gillilands sought to change the zoning of their property from agricultural[1] to commercial.

The Air Force opposed both zone change applications.

The Air Force opposition to the Gillilands' zone change applications was an admission that, because of jet aircraft overflights, noise and crash hazard, the Air Force had taken the property.

At trial, the Air Force defense was that it was mistaken in these 1973 statements. If that is true, the "mistake" was not announced until 1978. IN ANY EVENT, THE DAMAGE TO THE PROPERTY OWNERS WAS THE SAME: BECAUSE OF THE AIR FORCE'S 1973 STATEMENTS, THE PROPERTY OWNERS WERE DENIED THE RIGHT

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[1]The agricultural zone was used by the City and County as a "holding zone," *i.e.*, it permitted so few uses, the property was essentially useless and unzoned, awaiting later action by the City and County. See, *e.g.*, 3 Williams, *American Land Planning Law* (1975) §73.34 at 388:

> "In these cases, the existence of a holding zone, designed to delay development for one reason or another, has been noted in passing, as if it were one of the more familiar legal devices, and with no suggestion that any serious legal problem is presented. In some of these cases, a holding zone has been established on the theory that no one could tell what the future land use was going to be; and so a large reservoir of *vacant land has been put into a zone where the regulations would tend to discourage development — but with the understanding that, when conditions were right for development, the land could be transferred into another and perhaps quite different zone*." (Emphasis added.)

TO USE THEIR PROPERTY. Moreover, because of the publicity given those statements, there was no one who would buy property said to be noise-impacted and subject to a high risk of jet aircraft crash.

One of two things must be true: either the Air Force's 1973 statements were correct or they were not. If they were correct, then they establish a taking. If they were incorrect, the Air Force ought to be estopped to deny their truth, as those statements were acted on, to the prejudice of the Property Owners.

There is no dispute as to the Air Force's 1973 statements. They appear in the trial judge's findings:

Finding 23:

"(a) At the [City Planning] Commission's meeting on January 19, 1973, Mr. Maurice G. Pettit, the Civil Engineer of Plant 42, presented the Air Force objection to the application in a written statement:

* * *

"3: Studies made for the Air Force and the City show *this entire area to be in an area of sound with a rating of 100+ decibels*.

"4: Present opinion is this level of sound is harmful to human hearing and OSHA decrees that *hearing or ear protection must be worn* in levels of 80 decibels[2] and above, and *I cannot visualize ear muffs being worn in a bank*.[3]

"5: This is a short distance from the end of the runway on the direct centerline and *safety* must be considered as evidenced by *the recent 'Ice Cream Par-*

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[2]Decibels are on a logarithmic scale. Each 10 decibels is twice as loud. Thus, 100 dB is 4 times as loud as the 80 dB level which requires ear protection.

[3]A bank use for the property is appropriate because of the major street and corner location.

lor' accident in Sacramento." (App. A, pp. 12-13; emphasis added.)

Finding 24:

"(a) On January 22 and 25, 1973, Capt. Robert Suelzle, Chief of Air Force Plant 42, wrote letters to the Palmdale City Council and the Los Angeles County Regional Planning Commission protesting any rezoning:

"* * * The Air Force requests that complete and thorough environmental impact studies be completed before any further rezoning is done on *land which lies within high noise level areas as shown by the engineering studies.*" (App. A, p. 13; emphasis added.)

Finding 25:

"On February 13, 1973, Captain Suelzle attended a meeting of the Los Angeles County Regional Planning Commission, at which the application would be considered. He there stated, among other things, that '*the subject property lies in a 100* [*dB*] *noise level area*' and that 'the Air Force has no intention of closing or abandoning Runway 4/22.' " (App. A, p. 13; emphasis added.)

Finding 28:

"(a) At a public meeting of the Palmdale City Council on March 9, 1973, City Attorney Kostas reported to the council on the meeting with Deputy Assistant Secretary [of the Air Force] Jackson.

"(b) Captain Suelzle, who attended the meeting, stated to the Council that:

"(i) The property '*lies within 100* [*dB*] *noise level area.*'

"ii. 'The [Air Force] has no plans to my knowledge to abandon this runway [4/22] in the foreseeable future. The aircraft using this runway are first flight

aircraft which have *an inherent risk associated with their performance*.' " (App. A, pp. 14-15; emphasis added.)

Finding 30:

"(b) On the same day, after the meeting, Brigadier General Nunn wrote to both the Palmdale City Council and the Los Angeles County Board of Supervisors, opposing the request for a zone change, on the ground that

"* * * The tract under consideration, as revealed by the Base Noise Contour Plan, is *well within the 100 decibel sound zone*. It is further directly off a runway being used by aircraft undergoing initial flight testing — *a hazardous operation*. * * *." (App. A, pp. 15-16; emphasis added.)

Two things are noteworthy about these findings, which accurately reflect public statements by Air Force officials.

First. They are an admission by the Air Force that, in 1973, significant numbers of jet aircraft flew directly over the Gillilands' property at altitudes low enough to create such noise that no use could be made of the property. Likewise, the danger of an aircraft crash on the Gillilands' property was so significant that no use ought to be made.

Second. Although the trial judge recognized that the Air Force had made these admissions (as they are included in his findings), he refused to understand that these admissions proved the existence, frequency and loudness of the Air Force overflights. (With Findings 23-30 [App. A, pp. 12-16], quoted above, contrast Findings 66-67) [App. A, pp. 29-30]). As expressed by the trial judge in his opinion (p. 4 [App. A, p. 3]):

"Trial has produced no evidence of regularity or frequency, no evidence of low level flights, and no cred-

> ible evidence of noisy overflights, assuming that noise alone may constitute a taking."

Such a statement can be made only by ignoring the Air Force's admissions to the contrary. Indeed, as the trial judge himself said two paragraphs later in his opinion (pp. 4-5 [App. A, pp. 3-4]):

> "The Air Force did strenuously object to the rezoning, and the two local bodies denied the applications. Without any . . . untrue representations . . . high-ranking Air Force officers repeatedly urged denial of the applications on the grounds of the noise levels of overflights and the hazard of crashes from flights in and out of the base."

The trial judge thus found that the Air Force's 1973 representations of overflights, noise, and hazard were true. Yet, he ignored them, and elsewhere (Findings 66-67 [App. A, pp. 29-30]) said they were untrue.

In other words, what the trial judge did was to slice the Gillilands' case into two parts: an "overflight" case and a "zoning" case. He thereafter segregated the evidence, depending on which "part" of the case (*i.e.*, overflight or zoning) it "applied" to. Evidence of overflight, noise, and hazard which the trial judge found in the "zoning" case was ignored by the trial judge in the "overflight" case. The trial judge had to have erred. Either there were noise, hazard, and overflights, or there were not. If the Air Force was accurate in its 1973 representations there was a taking by 1973. If the Air Force was inaccurate, it misled the zoning authorities to the Gillilands' detriment and ought to be estopped to deny now the facts it heatedly urged in 1973.

Thus, self-blinded to the facts, the trial judge found for the Air Force. The Court of Claims, without a written opinion, simply affirmed and adopted the trial judge's actions (App. B).

REASONS FOR GRANTING THE WRIT

The Decision of the Court of Claims Conflicts With *All* Known Decisions Where the Evidence Shows Regular, Frequent, Noisy, Hazardous Overflights of Jet Aircraft.

It has been nearly two decades since this Court directly addressed the plight of airport neighbors whose property is regularly and frequently overflown by noisy and hazardous aircraft from a neighboring airport:

Griggs v. Allegheny County (1962) 369 U.S. 84;

U.S. v. Causby (1946) 328 U.S. 256.[4]

This Court plainly held that regular, frequent, noisy, hazardous aircraft overflights result in inverse condemnation liability for the governmental airport operator, be it a civilian (*Griggs*) or military (*Causby*) airport.

The courts of the various states,[5] as well as the lower federal courts[6] have followed this Court's lead.

Until this case.

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[4]*Cf. Jankovich v. Indiana Toll Road Comm.* (1965) 379 U.S. 487 [dismissing a writ of certiorari to the Indiana Supreme Court]; *City of Burbank v. Lockheed Air Terminal, Inc.* (1978) 411 U.S. 624 [dealing with police power regulation of airports by non-proprietors]; and *Laird v. Nelms* (1972) 406 U.S. 797 [dealing with tort liability for damage caused by sonic booms].

[5]*E.g., Ackerman v. Port of Seattle* (1960) 55 Wash. 2d 500, 348 P. 2d 664; *Thornburg v. Port of Portland* (1962) 233 Ore. 178, 376 P. 2d 100; *Martin v. Port of Seattle* (1964) 64 Wash. 2d 309, 391 P. 2d 540, *cert. den.* (1965) 379 U.S. 989; *Nestle v. City of Santa Monica* (1972) 6 Cal. 3d 920, 496 P. 2d 480; *Aaron v. City of Los Angeles* (1974) 40 Cal. App. 3d 471, 115 Cal. Rptr. 162, *cert. den.* (1975) 419 U.S. 1122; *City of Jacksonville v. Schumann* (Fla. Ct. App. 1967) 199 So. 2d 727; *Ferguson v. City of Keene* (1971) 111 N.H. 222, ____ A. 2d 605.

[6]*E.g., Bacon v. U.S.* (Ct. Cl. 1961) 295 F. 2d 935; *Jensen v. U.S.* (Ct. Cl. 1962) 305 F. 2d 444; *Aaron v. U.S.* (Ct. Cl. 1963) 311 F. 2d 798; *Avery v. U.S.* (Ct. Cl. 1964) 330 F. 2d 640; *A. J. Hodges Indus., Inc. v. U.S.* (Ct. Cl. 1966) 355 F. 2d 592.

Notwithstanding clear factual findings of regular, frequent, noisy[7], hazardous[8] overflights, the Court of Claims denied relief, thus conflicting with all prior case law.

This Court's attention is needed to reaffirm the heretofore settled rule of overflight liability. The decision herein threatens to undermine decades of settled law which gives some redress to those damaged by airport noise. That the decision below comes from the Court of Claims, which tries *all* cases involving federally owned airports, demonstrates the serious nature of this unsettling decision and the potential for widely spreading its erroneous precepts.

The Law Governing Estoppel Against the Government Needs This Court's Attention.

In an age when increasing numbers of citizens are required to deal with increasing numbers of government employees on issues that leave few aspects of life untouched, this Court has given little written attention to exploring the kinds of governmental activities which might invoke the equitable doctrine of estoppel against the government.

The issue is important. Citizens need to know the extent to which officially announced government policies can be acted upon.

Yet, as recently as last Term, both the majority and dissenting opinions in *Schweiker v. Hansen* (1981) ___ U.S. ___, 67 L. Ed. 2d 685, were in agreement that this Court had not yet decided what kind of conduct by government

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[7]The noise from the jets was so severe at the Gilliland property that ear protection was said to be required *even indoors*. (Finding 23[a][4]; [App. A, p. 12]).

[8]The danger of a crash was likewise severe (the Air Force witnesses invoked the memory of a [then] recent crash of an F-86 into a Sacramento ice cream parlor, which killed more than a dozen children at a birthday party) (Findings 23[a][5], 28[b][ii], 30 [b]; [App. A, pp. 13-16]).

employees might estop the government from denying the consequences of the conduct.

To be sure, the issue has been touched on in cases involving prosecution in the face of good faith reliance on administrative interpretation of a law[9] and compensation for governmental acquisition of facilities installed with government permission.[10] But there has been no general analysis.

The lower courts have been more active. They have invoked estoppel against the government in contexts ranging from statements in litigation or administrative proceedings,[11] to contracts,[12] to tax,[13] to immigration,[14] to soil banking.[15]

The common thread, which unites all these cases, is that the government represented the facts to be a certain way, action was taken in reliance on the governmental representation, and thereafter the government sought to change its position. The courts held the government estopped to change its position.

For example, in *Kent Homes*, 279 F. Supp. 650, the government (as condemnor) had taken the position in a condemnation case that money due the property owner as just compensation was not payable until certain conditions were fulfilled. The conditions were not fulfilled until fiscal

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[9]*United States v. Pennsylvania Chem. Corp.* (1973) 411 U.S. 655, 674.

[10]*Monongahela Navigation Co. v. U.S.* (1893) 148 U.S. 312, 325; *cf. Kaiser Aetna v. U.S.* (1979) 444 U.S. 164, 179.

[11]*Kent Homes, Inc. v. U.S.* (D. Kans. 1967) 279 F. Supp. 650, 659, *aff'd* (10th Cir. 1975) 512 F. 2d 395, 397; *Brandt v. Hickel* (9th Cir. 1970) 427 F. 2d 53, 56-57; *U.S. v. 35.00 Acres of Land* (W.D. Mo. 1962) 214 F. Supp. 792, 798.

[12]*U.S. v. Georgia-Pacific Co.* (9th Cir. 1970) 421 F. 2d 92, 95-103.

[13]*Walsonavich v. U.S.* (3d Cir. 1964) 335 F. 2d 96, 101; *Schuster v. C.I.R.* (9th Cir. 1962) 312 F. 2d 311, 318.

[14]*Gestuvo v. District Dir.* (C.D. Cal. 1971) 337 F. Supp. 1093, 1098-1101.

[15]*U.S. v. Lazy F C Ranch* (D. Ida. 1971) 324 F. Supp. 698, 701.

1959. Thereafter, the government (as tax collector) urged that the conditions were of no importance and the money was available (and, thus, taxable) in fiscal 1958.

The original position taken by the government in *Kent Homes* was adverse to the property owner, as it delayed the property owner's receipt of compensation. The government's changed position in *Kent Homes* was also adverse to the property owner, as it would have taxed him for income he did not yet have.

The Court refused to permit such a change of heart:

> "The government presents the case to the Court by ignoring undisputed factual background of the condemnation case. This, the Court should not and will not do. If the facts which the government now chooses to ignore were not present, surely the law as stated in the well prepared briefs of the government would sustain its position, but *the Court does not believe the Department of Justice should be permitted to take one position in a condemnation case when it seems appropriat for it to do so and then jump to an opposite position in a later tax proceeding when such position supports the government's claim.*" (279 F. Supp. at 659). (Emphasis added.)[16]

The same analysis is pertinent here. In 1973, the Air Force took what it thought was an appropriate position: opposing the zone change because of heavy air traffic, injuriously loud noise, and crash danger. This, the Air Force conceded.

But in the "overflight" segment of the case, the Air Force (and the trial judge) discuss the case (in the *Kent Homes* court's words) ". . . by ignoring undisputed factual background . . ."

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[16]On appeal, the Court of Appeals agreed (512 F. 2d at 397).

As in *Kent Homes*, the Air Force should not be permitted to ". . . jump to an opposite position in a later . . . proceeding when such position supports the government's [later] claim."

This sort of estoppel to change of litigational theory in mid-stream has been applied, in addition to trials, to preliminary negotiations (*U.S. v. 35.00 Acres*, 214 F. Supp. 792) and administrative proceedings (*Brandt*, 427 F. 2d 53). Indeed, the Court of Appeals in *Brandt* may have put its finger on the crux of the matter when it concluded (427 F. 2d at 57):

> "To say to these appellants, 'The joke is on you. You shouldn't have trusted us,' is hardly worthy of our great government."

Probably the most exhaustive judicial analysis of estoppel against the government was done in *United States v. Georgia-Pacific Co.* (9th Cir. 1970) 421 F. 2d 92.

In *Georgia-Pacific*, the Court noted several concepts which are pertinent at bench.

> *First:*
>
> "Equitable estoppel prevents a party from assuming inconsistent positions to the detriment of another party [Citation.] . . ." (421 F. 2d at 96).

What the trial judge countenanced here nullifies the above precept. In 1973, the Air Force effectively took the position that the overflights, noise, and crash danger were so severe that no use ought to be permitted of the Gillilands' property. Yet, six years later, when the Gillilands sought compensation from the Air Force for the overflights, noise and crash danger which prevented use of the property, the Air Force said there was no such interference. The Air Force's 1973 statements resulted in denial of permission to use the prop-

erty. It was error for the trial judge to permit the Air Force to evade the consequence of its 1973 statements.

Second:

> ". . . it is hardly in the public's interest for the Government to deal dishonestly or in an unconscientious manner. This is especially imperative in a time when few individuals and corporations, if any, can escape numerous dealings with the Government and its agents." (421 F. 2d at 100)

It doesn't matter whether the Air Force was sincere or not in its 1973 statements. What is unconscionable was the Air Force's abrupt change of position in mid-litigation, with the trial judge's approval of the government's shifting "facts" depending on whether the government was seeking to prevent development by a neighbor or defending against that neighbor's suit for compensation. The facts are the same. In 1973, the Air Force convinced local authorities that there were many noisy and dangerous flights. That stopped development. In good conscience, the trial judge should not have permitted the Air Force to "flip-flop" on the facts to avoid payment of compensation for those noisy and dangerous flights.

Finally:

> "Mr. Justice Holmes once wrote, 'Men must turn square corners when they deal with the Government,' but it is clear that the Government is itself becoming more reasonable by permitting those corners to be rounded when reason and logic demand that the Government be held to the same standard of rectilinear rectitude that it demands from its citizens. One commentator has summarized the law in this area by saying that, 'The claim of the government to an immunity from estoppel is in fact a claim to exemption from the requirements of morals and justice.' We agree, and we find that the dictates of both morals and justice indicate

> that the Government is not entitled to immunity from equitable estoppel in this case." (421 F. 2d at 103; footnotes omitted)

There is little to add. The Air Force has had the benefit of non-use of the Gillilands' property because of its heated 1973 representations that the property was heavily impacted by overflights and noise and was a potential site for jet aircraft crashes. Both morals and justice indicate a course contrary to that charted by the Air Force and taken by the Court of Claims. Having obtained its desired result based on representations of severe interference, the Air Force is estopped to deny that interference in an action for compensation.

On the other hand, there are cases like the one at bench, where the issue is swept under the rug by refusing to deal with it, and like *Mapco, Inc. v. Carter* (Temp. Em. Ct. App. 1978) 573 F. 2d 1268, 1277-1278:

> ". . . Plaintiffs seek to secure from this Court a ruling, admittedly without precedent, that there exists a hitherto judicially unrecognized and undefined individual constitutional right under the Ninth Amendment 'to trust the federal government and to rely on the integrity of its pronouncements.' We find no basis in constitutional history, judicial interpretation, political history, legal scholarship, or persuasive argument to conclude that such a right exists under the Ninth Amendment, or any other provision of the Constitution of the United States. . . ."

It is time for this Court's attention. Plainly, the lower courts, the government and the citizenry need guidance.

CONCLUSION.

The result "just ain't fair."

What clearly emerges from the record is that the facts admitted by the Air Force in 1973, about the impact of Air

Force overflights on the Gillilands' property, demonstrate a taking.

But the trial judge blinded himself to these admissions. He quarantined them in a separate compartment which he marked "zoning," and refused to examine them in the "overflight" case.

Because of the damage done the Gillilands by the Air Force's 1973 statements, the Air Force ought to be estopped to deny the truth of those statements. It is hard to improve on the words of the Court of Appeals in *Brandt* (427 F. 2d at 57):

> "To say to these appellants, 'The joke is on you. You shouldn't have trusted us,' is hardly worthy of our great government."

The decision by the Court of Claims conflicts with settled law regarding noise-impacted properties. As that court is charged with trying all cases involving claims against federally-operated airports, the significance of this deviation becomes great.

This Court's recent expressions of concern for the plight of property owners caught in a heavily regulatory era[17] also bear on the problem at bench. The reason the property was not rezoned for an economic use was to preserve it for an Air Force clear zone. That aspect of the case will be more clearly presented in the Petitions on the two companion cases against the zoning entities.

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[17]*E.g., Kaiser Aetna v. U.S.* (1979) 444 U.S. 164; *San Diego Gas & Elec. Co. v. City of San Diego* (1981) ____ U.S. ____ [particularly the dissenting opinion signed by four justices, generally concurred in on the merits by another, and disputed on the merits by no justice].

Finally, the law is overdue for an explication by this Court on the subject of estoppel against the government. There appears to be confusion in the lower courts, which can breed nothing but trouble in the years ahead.

This Court's review is needed.

Respectfully submitted,

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Appendix

APPENDIX A.

Opinion.*

In the United States Court of Claims, Trial Division, No. 546-76.

(Filed: September 25, 1980)

Robert J. Gilliland, Mary P. Gilliland, James S. Gilliland, and Frank M. Gilliland v. The United States.

Inverse Condemnation By Noise — By Zoning Interference — By Regulation.

William Stocker, attorney of record for plaintiffs. *Jerrold A. Fadem, Fadem, Berger & Norton*, of counsel.

Peter D. Coppelman, with whom was *Assistant Attorney General James W. Moorman*, for defendant.

SCHWARTZ, *Trial Judge:* Plaintiffs, the owners of a 33 acre tract close to an Air Force base near Palmdale, California, sue for an inverse condemnation, allegedly accomplished by the noise levels of overflights, by Air Force interference with local zoning regulation and by directly issued Air Force regulations. The base, known as Plant 42, houses several factories at which civilian contractors assemble and test-fly aircraft for the Air Force.

A motion for summary judgment has been denied on the ground that the alleged taking by a combination of causes presented a question worthy of trial. 215 Ct. Cl. 953. Trial has now shown that none of the claims has any merit in fact. Accordingly, any question of the significance of the coupling of separately insufficient claims does not arise.

Noise Levels. A noise expert, who did not visit the property but worked in his office and a library, testified for plaintiffs. He had chosen five planes as the noisiest of those

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*The trial judge's recommended decision and conclusion of law are submitted in accordance with Rule 134(h).

which flew in and out of Plant 42 in 1953, 1973 (the claimed year of taking) and 1978. These planes, he testified, created noise contours of 108 to 125 perceived noise decibels (PNdb), higher than the level suitable for human habitation. PNdb is the unit of measurement of a system which registers the listener's perception of the noise of a single event, and is thus not concerned with the frequency of flights.

The system of noise measurement generally employed by public agencies averages day and night flights and cumulates noise so as to take into account the frequency of overflights. In the system used by the witness, the same noise contour is produced by one overflight as by 50, daily or annually, of the same plane. The expert's choice of noise measurement system, alone, thus made his testimony dubious. One noisy plane is not a taking.

The expert assumed that the flights of the five planes took them over plaintiffs' property at altitudes of 1,500 feet for some of the five and 1,000 feet for others. These altitudes he got from library sources and from one of the plaintiffs. At trial, however, there was no proof of low-level overflight of plaintiffs' property by any of the five planes.

Plaintiffs' land is on the extended path of one of the two runways at the base, runway 4-22. The claim is one of noisy overflights in relation to this runway. Only two of the five planes, the F-5 and the SR-71, were shown to use runway 4-22. The F-5 has a preferred flight path which takes it away from plaintiffs' property; when it actually overflies the property, it is 2,000 feet high. The SR-71 almost invariably uses the runway other than 4-22, resorting to 4-22 only in emergencies. Neither altitude nor frequency of the SR-71's emergency use of runway 4-22 appears.

The other three planes, the F-89, the F-86 and the B-1, were not shown to have overflown plaintiff's property, at

any altitude. The F-89 has not been produced since 1958. The F-86 is not produced at Plant 42, and its appearance there is rare. Only four B-1s were ever built and they did not fly in or out of Plant 42 for years on end. When they did, they used the other runway which took them away from plaintiffs' property. The evidence is thus that overflights of plaintiffs' property by planes using runway 4-22 are most unusual, and when they occur their altitude is more than 500 feet.

Regular and frequent flights at low levels, causing direct, immediate and substantial interference with the use of a claimant's land, are indispensable to the conclusion that a taking has occurred. *United States v. Causby*, 328 U.S. 256, 266 (1945); *A.J. Hodges Industries, Inc. v. United States*, 174 Ct. Cl. 259, 262, 355 F.2d 592, 594 (1966). The requisite level was put at 500 feet in *A.J. Hodges Industries, Inc.* Trial has produced no evidence of regularity or frequency, no evidence of low level flights, and no credible evidence of noisy overflights, assuming that noise alone may constitute a taking. *Cf. Batten v. United States*, 306 F.2d 580 (10th Cir. 1962); *A.J. Hodges Industries, Inc., supra*. The sum is no showing of any interference with plaintiffs' use, at least by noise from overflights.

Interference with Local Zoning. The claim here is that the Air Force by improper means brought about the denial of plaintiffs' applications in 1973 to the authorities in the County of Los Angeles and the City of Palmdale (the tract lies in both jurisdictions) for a rezoning from agricultural to commercial. The plaintiffs apparently did not seek judicial review.

No improprieties have been shown. The Air Force did strenuously object to the rezoning, and the two local bodies denied the applications. Without any improprieties — secret meetings, untrue representations or the like — high-ranking

Air Force officers repeatedly urged denial of the applications on the grounds of the noise levels of overflights and the hazard of crashes from flights in and out of the base. The civilian contractors at the base joined in these representations.

In all this, the Air Force was entirely within its rights as an affected landowner. *De-Tom Enterprises, Inc. v. United States*, 213 Ct. Cl. 362, 552 F.2d 337 (1977); *NBH Land Co. v. United States*, 217 Ct. Cl. 41, ____, 576 F.2d 317, 318 (1978); *Lynch v. United States*, Ct. Cl. No. 491-77, Order of Nov. 30, 1979, ____ Ct. Cl. ____. And if the Air Force had improperly influenced the zoning authorities, that would be a tort beyond this court's jurisdiction, as the court pointed out on the motion for summary judgment. 215 Ct. Cl. 953, 955.

An expert appraiser testified for plaintiffs that the value of the land rose with an expectation of approval of the rezoning and dropped when the rezoning applications were denied. The testimony is not credited. The tract had been zoned agricultural, since long before the plaintiffs bought it in 1966 and 1967. Vigorous and successful opposition by the Air Force to any change in zoning should have been expected, and should have dampened any thought of a rise in value in an anticipation of rezoning. Indeed, the witness admitted that Air Force opposition to rezoning was likely and was in fact the "compelling" cause of the denial. The testimony is in any event irrelevant in view of the conclusion that no actionable blame attaches to the Air Force for the denial.

Air Force Regulations. Between 1972 and 1976, the Air Force issued a series of draft and final directives and studies, containing successive versions of its policy on the compatibility of base flying operations with the use of land surrounding bases in general and this base in particular. These

documents, whose title is abbreviated to AICUZ, for Air Installation Compatible Use Zone, discuss the circumstances in which easements of surrounding land should be purchased to protect the flying mission of a base. Persuasion of local authorities to curb the development of surrounding land is if necessary to be followed by recommendations in appropriate cases that easements be purchased. None of these documents, described in detail in the accompanying findings, constitute an interference or regulation of plaintiffs' land, or a control of zoning, much less such "extensive or intrusive" regulation (*De-Tom Enterprises Inc. v. United States*, 213 Ct. Cl. 362, 365, 552 F.2d 337, 339 (1977)) as in the absence of physical invasion might amount to a taking, under such cases as *Benenson v. United States*, 212 Ct. Cl. 375, 548 F.2d 939 (1977).

The complaint is dismissed.

FINDINGS OF FACT

1. The plaintiffs, Robert J. Gilliland, Mary P. Gilliland, James S. Gilliland and Frank M. Gilliland, are the owners of a 33.3 acre plot located in part in the City of Palmdale and in part in the County of Los Angeles. The claim made is that of a taking of this property by overflight noise levels by Air Force regulation and by Air Force interference with and control of local zoning regulation.

2. The property is located 2,800 feet from an airport owned and operated by the U.S. Air Force and known as Plant 42. Several airplane manufacturers assemble and flight test aircraft, including experimental aircraft, at the Plant, in government-owned facilities. The property is at Avenue P, a main thoroughfare, and 8th Street, the main entrance to the Lockheed plant at Plant 42.

3. The contractors using the production facilities at Plant 42 as of 1976 and the planes which have been or are manufactured there were:

McDonnell-Douglas	A-4 Skyhawk
Lockheed	F-104 (storage); SR-71; the U-2 (modification and maintenance)
Rockwell International	B-1 Intercontinental Strategic Bomber (cancelled)
Rockwell Space Division/NASA	Space Shuttle
Northrop	F-5 Freedom Fighter

Rockwell International and McDonnell-Douglas ceased operations at Plant 42 in 1979.

4. The Air Force has approximately 3,300 civilian employees and a military staff of 55 at Plant 42. The civilian contractors have 8,800 to 12,000 employees, with an annual payroll of $46 million, representing over 10 percent of the annual payroll for the entire Lancaster-Palmdale region.

I

Alleged Taking by Overflight Noise

The Claim

5.(a) Plant 42 has two active runways, designated by compass reading. One lies east-west and is known as 7-25. The other, designated 4-22, lies northeast-southwest and crosses 7-25 diagonally. Runway 7-25 has a first-rate surface, lights, an instrument landing system permitting use at night, and handles the heavier aircraft and a total of 80 percent of the plant's traffic. Runway 4-22 has no lights, no instrument landing system, a washboard-like surface, and is mainly used by the lighter aircraft, usually the fighters.

(b) The property is located 8,300 feet from the southwestern end of runway 4-22 and on its centerline as extended.

(c) The plaintiffs claim a taking by noise from overflights by planes approaching on runway 4 and departing on runway 22.

(d) There is no claim or showing that the property is subject to vibration, fallout, odor, or a sooty residue. There is no evidence of any substance of a "taking by hazard" or by overflights other than by noise levels.

The Expert Testimony as to Noise Levels

6. The testimony of a noise expert, Mr. Joseph Ortega, was presented in support of the claim that the property is subject to confiscatory levels of noise from overflights on runway 4-22.

7.(a) In performing his study, Mr. Ortega worked only in his office and the library. He did not visit either the site of the property or Plant 42, and he took no measurements with instruments.

(b) Mr. Ortega testified that the validity of his noise contours depended on the validity of the assumptions and the data that he used; that the factors assumed included the types of aircraft, the flight tracks, and the height over the property, and that if any of these factors were in error, he would have to modify his noise contours.

8.(a) Mr. Ortega was given three dates by plaintiffs' counsel — 1953, 1973 and 1978. From a list of all planes flying in and out of Plant 42 on these three dates he then chose the five noisiest aircraft on which to base his noise contours. There were the B-1, which flew in 1978, the SR-71, and the F-5, which flew in 1973, and the F-86 and the F-89, which flew in 1953. He described the B-1 as the "loudest aircraft ever built," with the SR-71 a close second.

(b) He testified to noise contours, created by these aircraft, of 108 to 125 PNdb per individual event of jet noise exposure.

(c) Places subject to noise greater than about 85 PNdb are unsuitable for residential use, *i.e.*, human habitation.

Mr. Ortega's Noise Measurement System

9.(a) The system used by Mr. Ortega is the perceived noise level system, expressed in PNdb. It is an individual or single event noise descriptor system. The "PNdb" expresses, on a logarithmic scale, the perceived noise level. That is, it evaluates the subjective human experience of the noise exposure of a single overflight.

(b) No public agency has adopted the single event noise descriptor system for land use planning purposes. The public agencies use a cumulative noise descriptor system, which takes into account frequency of flight and, in the case of the Ldn system used by the Air Force, time of day as well. The Ldn cumulative system, the Day-Night Average Sound Level (Ldn) has been recommended by the Environmental Protection Agency for use by all federal agencies, and has been adopted by the Department of Defense for all branches of the military service.

The Air Force used the single event noise descriptor system, among others, from 1970 to 1976.

Overflight Frequency

10.(a) The PNdb single event noise descriptor system used by Mr. Ortega does not take into account the frequency of overflights.

(b) Mr. Ortega did not know and was not concerned with, the frequency of overflights of the property by the planes on which he based his noise contours, or, indeed,

whether any of the planes on which he based his contours actually took off or landed over plaintiffs' property.

(c) His choice of planes flying in or out of Plant 42 in any of the years 1953, 1973 and 1978 permitted him to testify to noise from overflights on dates other than the alleged date of taking in 1973, or from a runway which did not bring the plane over plaintiffs' property.

Altitude of Overflights

11.(a) Mr. Ortega assumed that each of the aircraft whose noise he computed flew directly overhead the property, the B-1 bomber and the SR-71 at an altitude of 1,000 feet, the F-5, F-86 and F-89 at 1,500 feet. Some of these altitudes he was given by Mr. Gilliland, some came from Air Force publications. That they flew directly over the property was his assumption.

(b) Plaintiffs' claim that the glide slope of runway 4-22 is less than 500 feet over the property is meaningless. The term "glide slope" has no meaning when used in reference to a runway, such as 4-22, which has no instrument landing system.

(c) Planes landing over plaintiffs' property on runway 4-22 would be more than 500 feet above ground level (AGL). Planes taking off to the southwest from that runway would normally not pass over plaintiffs' property; any that do would be higher than 500 feet above ground level.

(d) There is no probative evidence in the record of overflights of plaintiffs' property at the altitudes assumed by Mr. Ortega or at altitudes of less than 500 feet.

Actual Overflights by the Aircraft on which Mr. Ortega's Noise Levels were Based

12. The following findings 13-17 state the contents of the record as to overflights by the five aircraft on which Mr. Ortega's noise contours were based.

13. *The B-1 Bomber.* (a) Only four B-1 bombers were built, all assembled at Plant 42. The last one took off from Plant 42 in February 1979. Between 1968 and 1978 two B-1s took off from Plant 42; both of them departed on runway 7-25 to the east. None of these took off in 1973 (or between January 1972 and July 1974), the year of the alleged taking.

(b) The record does not show any overflights of the property by B-1s.

14. *The SR-71.* (a) The SR-71 lands and takes off at Plant 42. The washboard nature of runway 4-22 is so exaggerated at the speeds the SR-71 reaches on take-off, that pilots of SR-71s refuse to take off on 4-22. In almost all instances the SR-71 uses runway 7-25. Landings on runway 4-22 take place only in emergencies.

(b) The record does not show the number, frequency or altitude of overflights of the property by SR-71s.

15. *The F-5.* (a) The F-5 is a production aircraft at Plant 42. The preferred direction take-off on runway 4-22 is toward the northeast, because the production facilities for the aricraft are near the western end of the runway. For the same reason, the preferred direction on landing is toward the southwest.

(b) On those occasions when F-5s land on runway 4-22 toward the northeast, the pilots invariably use an overhead circling pattern, which means that they are 2,000 feet above the ground when they are above plaintiff's property.

(c) On takeoffs on runway 4-22 to the southwest, the F-5s make either a right or left-hand turn before reaching plaintiffs' property, so that there is no overflight at all.

(d) The F-5 does not overfly the property at levels below 2,000 feet.

16. *The F-89.* (a) F-89s have not been produced at Plant 42 since 1958, when McDonnell-Douglas took over the Northrop facility, which had previously produced F-89s.

(b) Accordingly, the F-89 does not overfly the property.

17. *The F-86.* (a) The F-86 is not a production plane, that is, a plane being manufactured or assembled at Plant 42. F-86 appearances at Plant 42 are extremely rare.

(b) The record does not show the number and frequency of overflights of the property by F-86s.

II

Alleged Taking by Air Force Interference with Local Zoning Regulation

The Zoning of the Property

18. Plaintiffs' property has been zoned A2-5 throughout — when they bought the property in 1966 and 1967, when they unsuccessfully applied for a zone change in 1973, and at the time of trial in 1979.

19. There is now no structure on the property. Formerly there was a ramshackle building which was rented until it burned in 1972. Since then, plaintiffs have had no use or enjoyment of the property, other than as an investment.

20.(a) The Air Force purchased the land for Plant 42 from the County of Los Angeles in 1952. At that time the County Board of Supervisors adopted a resolution that it would make no changes in the present zoning of the land within a mile of the airport without prior notice to the Air Force of the suggested changes.

(b) The plaintiffs' 33.3 acre tract is within the one-mile buffer zone referred to in the 1952 resolution of the county.

(c) When the City of Palmdale was incorporated in 1962, it adopted the county's zoning ordinance as its own.

21. Plaintiffs bought five acres of the 33.3 acre tract in the City of Palmdale in 1966 for $15,972. The remaining 28.3 acres, in the County of Los Angeles, were bought in 1967 for $110,000.

The 1973 Application for Rezoning

22. In January 1973, the plaintiffs applied to the zoning authorities of the City of Palmdale and the County of Los Angeles for a change in zoning from A2-5, agricultural, to Planned Commercial Development Zone (CPD). The first meeting scheduled to consider the application was that of the Palmdale Planning Commission, the advisory body on planning in Palmdale.

23.(a) At the Commission's meeting on January 19, 1973, Mr. Maurice G. Pettit, the Civil Engineer of Plant 42, presented the Air Force objection to the application in a written statement:

> I object on behalf of the Air Force to subject Zone Change No. 72-3, or at least request a continuance until after Thursday, Jan. 25th, at which time the County of Los Angeles will hold a hearing for the same applicant on parcels across Ave. P for a similar request.
>
> Objections are:
>
> 1: Entire area around AF Plant 42 has been zoned A-2 and the County has always respected Air Force opinion on zone changes.
>
> 2: It was understood the City of Palmdale would continue the same policy.
>
> 3: Studies made for the Air Force and the City show this entire area to be in an area of sound with a rating of 100 + decibels.
>
> 4: Present opinion is this level of sound is harmful to human hearing and OSHA decrees that hearing or ear protection must be worn in levels of 80 decibels and above, and I cannot visualize ear muffs being worn in a bank.

5: This is a short distance from the end of the runway on the direct centerline and safety must be considered as evidenced by the recent 'Ice Cream Parlor' accident in Sacramento.

(b) At the meeting, the Palmdale Planning Commission approved the application, by a vote of 5 to 0.

24.(a) On Januray 22 and 25, 1973, Capt. Robert Suelzle, Chief of Air Force Plant 42, wrote letters to the Palmdale City Council and the Los Angeles County Regional Planning Commission protesting any rezoning:

> * * * The Air Force requests that complete and thorough environmental impact studies be completed before any further rezoning is done on land which lies within high noise level areas as shown by the engineering studies.

25. On February 13, 1973, Captain Suelzle attended a meeting of the Los Angeles County Regional Planning Commission, at which the application would be considered. He there stated, among other things, that "the subject property lies in a 100 Db noise level area" and that "the Air Force has no intention of closing or abandoning Runway 4/22."

Whereas, the Commission finds as follows:

26.(a) On February 20, 1973, the County Regional Planning Commission unanimously recommended denial of the application on the basis of the following findings:

1. The subject property lies within the primary impact area of the proposed Palmdale Intercontinental Airport;
2. Large amounts of undeveloped commercial and manufacturing zoning are located near to the subject property;
3. Adequate demonstration of need for the requested additional commercial zoning in this general area was not made at the public hearing; and

4. The providing of additional commercial zoning, in this portion of the community would not be in the interest of the public welfare or consistent with good zoning practice; * * *

(b) The plaintiffs appealed the County Planning Commission's decision of February 20, 1973, to the County Board of Supervisors.

27.(a) On March 7, 1973, three Palmdale officials, Mayor St. Clair, Councilman Chimbole and City Attorney Kostas met with the Deputy Assistant Secretary of the Air Force, Mr. Donald Jackson, to discuss the Air Force view on zoning around Plant 42.

(b) At the meeting, Deputy Assistant Secretary Jackson said that his office was concerned with any action which might intrude on the mission of Plant 42 and that he believed that any "encroachment by development" would produce noise complaints which would make the mission of Plant 42 difficult to accomplish.

(c) A further meeting was planned with Brig. Gen. Don Nunn, Chief of the Contract Management Division of the Air Force.

28.(a) At a public meeting of the Palmdale City Council on March 9, 1973, City Attorney Kostas reported to the council on the meeting with Deputy Assistant Secretary Jackson.

(b) Captain Suelzle, who attended the meeting, stated to the Council that:

i. The property "lies within 100 Db noise level area."

ii. "The [Air Force] has no plans to my knowledge to abondon this runway [4/22] in the foreseeable future. The aircraft using this runway are first flight aircraft which have an inherent risk associated with their performance."

iii. "The [Air Force] did not purchase the property off Runway 4/22 because its zoning was adequate."

(c) The council adjourned consideration of the application for 60 days, to enable city officials to meet with Brigadier General Nunn.

29.(a) On April 17, 1973, Lockheed Corporation, one of the contractors at Plant 42, wrote to the Los Angeles zoning authorities opposing the plaintiffs' application for a zone change:

> The various contractors utilizing A.F. Plant 42 (Lockheed, Rockwell, Northrup, and McDonnell Douglas) have *met several times* in the past month to discuss this issue [the zone change request]. It is the consensus of this group that we must oppose this zone change request for the following reasons * * * [emphasis in original]

(b) In May 1970 and November 1971, Lockheed had written the Palmdale City Manager saying it had no objection to the rezoning application.

30.(a) A meeting between Palmdale City officials and Brigadier General Nunn took place on April 23, 1973. The particular purpose of the meeting was a discussion of the plaintiffs' application, but the city officials also wanted to discuss Air Force policy and planning for the provision of guidance to municipalities on rezoning of property near the Air Force bases.

(b) On the same day, after the meeting, Brigadier General Nunn wrote to both the Palmdale City Council and the Los Angeles County Board of Supervisors, opposing the request for a zone change, on the ground that

> * * * The tract under consideration, as revealed by the Base Noise Contour Plan, is well within the 100 decibel sound zone. It is further directly off a runway being

used by aircraft undergoing initial flight testing—a hazardous operation. * * *

31.(a) On April 26, 1973, the County Board of Supervisors at a public meeting considered the application and denied it.

(b) Aircraft contractors at Plant 42, testifying in support of the Air Force position, stated that the buffer zoning is "designed to protect the general welfare of the community, Air Force plant capability, and to prevent recurrence of jet airfield losses experienced in [the] Los Angeles area."

(c) In response to the plaintiffs' request for a postponement and in moving approval of the Regional Planning Commission's recommendation that the application for a zone change be denied, Los Angeles County Supervisor Ward said:

* * * * *

> Well, these matters are scheduled and I think that both you and your attorney knew the processes of the Planning Commission and the appeals procedures. It was you who instigated the appeal, not the Regional Planning Commission or the Board of Supervisors. You disagreed with the earlier finding. So the fact of the appeal was in your hands, I believe, if I may say so. I think the record would show that. There are a number of factors involved. The property is south of Avenue P and I don't know what information the Mayor of Palmdale might wish to communicate, but to my knowledge there has been none to my office or to me. Ah . . . there is a safety factor that is on the minds of a great many persons in that area and some of the correspondence on the subject recalls the incidence at the Sacramento Airport of a few tragic months ago there. There is some correspondence that describes the property as being directly beneath the approach path for runway 4 and departure path for runway 22. This

has to do with Air Force Plant 42 at Palmdale now in operation. So for real and serious reasons, there have been objections to the granting of the zoning that you request. I don't know what your attorney's schedule is nor what the wishes of the Board members here today will be, but my view today is one in which based on the information available from my office, persons who have contacted my office, and the concern for safety, all suggest that the view of the Regional Planning Commission be upheld and therefore Mr. Chairman, I so move.

* * * * *

(d) The County Board of Supervisors voted unanimously to approve the recommendation of the Regional Planning Commission that the application be denied.

32.(a) On May 11, 1973, the adjourned Palmdale City Council meeting (finding 28(c)) took place.

(b) Prior to the meeting, the Air Force solicited support from the contractors at Plant 42 to assist in the opposition to the request for rezoning.

(c) At the meeting, opposition to the zone change was stated by Captain Suelzle, by Lt. Col. John D. Thompson, Commander, Det. 2, Air Force Contract Management Office, Edwards Air Force Base, and by a representative of the contractors at Plant 42. Brigadier General Nunn's letter of April 23, 1973 (finding 30(b)) was read into the record.

(d) The City Council denied the application, by a vote of 3 to 1.

(e) Captain Suelzle expressed the opinion, in a memo of October 25, 1973, that Brigadier General Nunn's support of the opposition to the application was the decisive factor in the denial.

33. There is no evidence that plaintiffs sought any further review of the denial of the applications for rezoning.

Plaintiffs' Expert Testimony on the Denial of the Rezoning Applications

34.(a) Mr. Earl Metcalfe, a qualified appraiser, testified for plaintiffs. Mr. Metcalfe gave his opinion on two questions: (1) why the plaintiffs' zone change applications were denied; and (2) a change in market value of the property by reason of the denial of the applications.

(b) He did not know what questions he would be asked until the night before the scheduled trial began, in which he began testifying on the second day of trial. Thus his preparation for his testimony took approximately 1 day.

(c) He said that his opinions were based on "investigations" he had been conducting over the years. He has no formal files on these "investigations" and he has not assembled any kind of report on them.

35. On the first of the two questions on which he testified, as to why the applications for rezoning were denied, Mr. Metcalfe testified that:

(a) Air Force opposition to the rezoning was probable and that the "urgings of the Air Force were the primary factor" influencing the denial of the applications for rezoning. Again, "the compelling reason for the denial was the position of the United States Air Force."

(b) It was "probable," Mr. Metcalfe said, because it would violate a so-called "buffer zone" surrounding Plant 42, whose existence was "common knowledge" at the time.

(c) The nature of the buffer zone, in Mr. Metcalfe's understanding, was that:

> It is really a written agreement to provide notice and then understanding that the county will try to hold free the areas the Air Force wants to have kept clear; as I understand it.

36.(a) On the second question on which he testified, as to a change in market value of the property by reason of the denial of the zone change applications, Mr. Metcalfe said that the market value for speculative purposes of the properties dropped from $25-35,000 per acre to $10,000 per acre for the city property (5 of the 33.3 total acres involved) and from $20,000 per acre to $2,000 per acre for the county property (the remaining 28.3 acres).

(b) He reached this conclusion because before the denial of the application there was a "reasonable probability," as opposed to only a "possibility" that the application would be granted, and the property would be developed. After the denial, there was no such probability.

(c) These opinions seem to be self-contradictory. If, as he testified, Air Force opposition was "probable" or a "reasonable probability" and its opposition was in fact "compelling," there is little or no basis for an opinion that there was a "reasonable probability" before the meetings that the zone change applications would be approved.

37.(a) Mr. Metcalfe also testified that the specific proposed use was a relevant factor in judging whether approval of a zone change request was "reasonably probable" and that it was "highly probable" that a zone change request to build a gas station on the property would be approved, because the property was a "good place to build a gas station."

(b) This opinion testimony is not credible in the light of the history of the zoning of the property and the witness's testimony that Air Force opposition to the application for rezoning was probably in advance and was the "compelling" reason for the denial.

Since the plaintiffs bought land, zoned agricultural, near an air base, all concerned should have expected both vig-

orous and successful Air Force opposition to rezoning. There is consequently little basis for an opinion that values went up contingent on rezoning.

More specifically, Air Force opposition to a gas station would be "probable" for the reasons that newly assembled aircraft are flown out of Plant 42 for the first time; that the property is located in one of the accident potential zones of the Plant; and that the Air Force considers a gas station, with its storage tanks filled with highly flammable liquid, an incompatible use for the property. Air Force opposition, it appears from the witness's own testimony, would be likely to be successful.

38. Mr. Metcalfe's entire testimony is not credible and not probative. It was based on insufficient or no expertise, was ill-prepared, and was otherwise not persuasive.

III

Taking by Air Force Policies on Compatible Land Use (AICUZ)

39. The first Air Force policy concerning compatible uses of land around military air bases was known as the "Greenbelt Concept," and was set forth in an Air Force memorandum dated March 18, 1971:

> 1. To preclude further encroachment on Air Force bases which might have an impact on mission accomplishment and to protect surrounding area from nuisance, noise, and other hazards of airfield activities which result in citizens' objections, the Air Force has developed the 'Greenbelt Concept.'

40.(a) The Greenbelt Concept contemplated the limitation of land use through the acquisition of restrictive easements within a defined area or zone around bases with dimensions of 2½ miles from primary runway ends by 1 mile laterally from the runway centerline:

> 2. The 'Greenbelt Concept' basically envisions an area extending two and one-half miles from primary runway ends and one mile laterally from runway center line. * * * Use of non-Air Force land within the Greenbelt area will normally be controlled by restrictive easements to limit population density, size and/or type of facility, and uses which can be made of land.

(b) The plaintiffs' property is within the defined zone.

41. The Greenbelt Concept contemplated that such easements as would be acquired would be purchased for approximately 50 percent of fee value:

> Use of private land will be controlled mainly by the acquisition of restrictive easement type of real estate interest. For planning purposes, the type of restrictive easement envisioned will approximate 50% of the fee value of the land. The exchange of government held land for restrictive easements will be fully explored in order to lessen the dollar impact. * * *

42. The memorandum promulgating the Greenbelt Concept did not direct any acquisitions but rather the development of information concerning easements recommended for acquisition:

> 4. It is requested that you develop and submit by 9 April 1971 a priority listing of all bases within your Command for application of the 'Greenbelt Concept.' It is further requested that you furnish not later than July 1971 information as required in attachments 1 and 3 for each base where you recommend application of the Greenbelt. * * *

43. Application of the Greenbelt Concept to Plant 42 was speculative. The Concept applied only to much more active air bases, described as "bases that have projected hardcore flying missions."

44. The Greenbelt Concept was never actually implemented. No property was acquired pursuant to it before it

was superseded in 1972 by the Air Installation Compatible Use Zones (AICUZ 72).

45. AICUZ 1972, which replaced Greenbelt, was formulated in an Air Force memorandum of March 2, 1972, containing a draft regulation.

46. AICUZ 1972 differed from Greenbelt in that the principal thrust of its policy on compatible land use was a dealing with local agencies in the normal land use planning process, and a resort to acquisition only when such dealing proved unsuccessful:

> This regulation establishes as Air Force policy the concept of securing compatible land use in non-Government areas around military airfields. This concept is referred to as the [AICUZ]. Its purpose is not to require that such land remain open space, unused except for agriculture, but to foster uses that are reasonably compatible with the noise and occasional hazards of military aircraft operation. Four basic techniques are to be used to secure compatible land use: encourage adoption of local zoning for compatible land use; exchange excess or surplus Government land for land of equivalent value within the compatible use area; and as a last resort, purchase restrictive easements or fee acquisition. * * *

47. AICUZ 72 contained a "Model Zone Ordinance" to be enacted by local zoning authorities. The ordinance prohibited human habitation in an area 2 miles wide along the extended runway centerline for a distance of 2½ miles from the end of the runway. Such an area would have included the plaintiffs' property.

48. The draft regulation in AICUZ 72 was the current Air Force effort to formulate a policy on the subject during the entire period in which the plaintiffs' applications for rezoning changes were pending in January 1973.

49. On July 30, 1973, 2 months after the final vote denying the plaintiffs' applications for a rezoning, the Department of Defense published AICUZ 73, as Air Installation Compatible Use Zones, Department of Defense Instruction No. 4165.57.

50.(a) DOD Instruction No. 4165.57, known as AICUZ 73, sought to insure land use in the vicinity of air bases compatible with aircraft operations:

* * * * *

> A. Current airfield and airspace clearances may not provide sufficient space around air installations to assure that all possible uses of land in the vicinity of the air installations are compatible with aircraft operations. In attempting to define compatible use, the safety and noise of aircraft operations are prime considerations. * * *
>
> * * * * *

(b) AICUZ 1973 recommended working with local governing and zoning authorities to avoid acquisition of rights in land:

> B. Compatible Use Land
>
> * * * * *
>
> 1. Where practical and advisable, necessary rights (see paragraph C, below) in land within the AICUZ will be obtained through land exchange, purchase, donation or other methods, or retained for the protection of the operational capability of air installations under the AICUZ program. However, the cost of acquisition of such rights may approach the cost of fee title. Therefore, whenever possible and within the framework of OMB Circular A-95 (reference (h)), attempts should be made to work with local governing bodies, planning commissions (regional and local), zoning boards, and

similar bodies to alleviate the problems through means other than acquisition.

a. Local zoning regulations are, in many ways the most desirable methods of controlling land use since they do not remove land from tax rolls and can achieve orderly development of land with minimum Federal involvement. * * *

b. Agreements with local governing bodies affording the Federal Government the opportunity to meet with them and to present the circumstances existing with respect to the AICUZ and the AICUZ program whenever any proposed actions affecting land within the AICUZ are under consideration, are also desirable and should be sought. Testimony should be presented in open hearings and emphasis should be placed on compatible uses. * * *

* * * * *

2. In situations where compatible use zones involve areas of high intensity land use, acquisition of necessary interests to protect the operational capability of the airfield may appear uneconomical. In such cases, a complete economic analysis and assessment of the future of the installation must be made.

* * * * *

3. Nothing in these criteria shall be used to justify solely for the AICUZ program either the acquisition of interests beyond the minimum required to protect the Government, or the retention of owned interests beyond the minimum required.

* * * * *

(c) AICUZ 73 is not a direction that the plaintiffs' property be acquired.

51.(a) In accordance with an Air Force program to make an AICUZ study for each of the Air Force fields, a specific AICUZ study for Plant 42 was prepared in 1976.

(b) Generally speaking, these AICUZ studies are intended to provide land use guidelines to be recommended by base commanders to communities for use in the land use planning and control process. In the words of the AICUZ 76 study of Plant 42:

* * * * *

> It is Air Force policy to work toward achieving compatibility between air installations and neighboring civil communities by means of a compatible land use planning and control process conducted by the local community. The system for identifying and assessing land use compatibility is derived from the AICUZ concept. This concept embodies a process of projecting, mapping and defining aircraft noise and accident potential areas within the air base environs. Land use compatibility guidelines are applied to these areas and serve as the basis for Air Force recommendation to the communities for use in their land use planning and control process.
>
> Air Force commanders at major command and base level establish and maintain active programs to achieve the maximum feasible land use compatibility between air installations and neighboring communities. The program requires that all appropriate governmental bodies and citizens are fully informed whenever AICUZ or other planning matters affecting the installation are under consideration. * * *

* * * * *

52.(a) The AICUZ studies of individual bases analyze noise and accident potential at the particular base and identify land use for specific areas near the base which would be compatible with the air operations conducted thereon.

(b) Overlays depicting noise contours and accident potential zones for the base under study are superimposed on base drawings to yield compatible use districts. Charts then

match each district with a list of particular land uses considered compatible.

53. AICUZ 76 designates "Accident Prevention Zones" and "Noise Zones":

* * * * *

> The AICUZ consists of land areas upon which certain land uses may obstruct the airspace or otherwise be hazardous to aircraft operations and land areas which are exposed to the health, safety, or welfare hazards of aircraft operations * * *
>
> * * * * *
>
> The AICUZ program designates Accident Potential Zones (APZ) and Noise Zones (NZ) and provides land use compatibility guidelines for these zones. * * *

* * * * *

54. Accident Potential Zones are determined by the dimensions of the "clear zones" of a runway. The clear zone for runway 4-22 at Plant 42 extends 3,000 feet from each threshold to form the inner boundary of APZ-1.

55. AICUZ 76 gives the dimension of the Clear Zone and the Accident Potential Zones of runway 4-22 as follows:

> (a) The clear zone is 3,000 feet long, from the end of the runway;
>
> (b) Accident Potential Zone I, begins at the end of the clear zone, 3,000 feet from the end of the runway, and continues for 5,000 feet, to a point 8,000 feet from the end of the runway;
>
> (c) Accident Potential Zone II begins at the end of APZ 1, 8,000 feet from the end of the runway, and continues for 7,000 feet, to a point 15,000 feet from the end of the runway.

56. AICUZ 76 developed Noise Zones (or Contours) for Plant 42 under study using the Day-Night Average Sound Level (Ldn) System recommended by the Environmental

Protection Agency and adopted by the Department of Defense.

57.(a) Height and obstruction criteria, although addressed in AICUZ 76, are not directly used in deriving compatible use districts, noise zones, or accident potential zones.

(b) Obstruction clearance criteria are defined in terms, *inter alia*, of "primary surface" and "clear zone surface." The "primary surface" of a runway defines the limits of the obstruction clearance requirements in the immediate vicinity of the landing area. The primary surfaces are surfaces of the runways, runway shoulders, and lateral safety zones.

58.(a) Runway 4-22 consists of a 12,000 foot runway with 1,000 foot asphalt concrete overruns at each end.

(b) The length of the primary surface of the runway is thus the same as the runway length plus overruns, a total of 14,000 feet. The width of the primary surfaces of runway 4-22 is 2,000 feet, or 1,000 feet on each side of the runway centerline.

(c) Where the primary surface ends, a 3,000 foot "clear zone surface" begins, along the extended centerline of each runway.

59.(a) "Clear zone surfaces" define the limits of the obstruction clearance requirements contiguous to the end of the "primary surfaces." The length of the clear zone surfaces is 3,000 feet.

(b) "Clear Zone Surfaces" used in the context of height and obstruction criteria and measured from the end of the overrun, 1,000 feet beyond the end of the runway, are to be distinguished from "clear zones" used in context of Accident Potential Zone definition and measured from the end of the runway.

60. The property is 8,300 feet from the end of the 12,000 foot runway 4-22 and 7,300 feet from the runway's primary surface, as defined by AICUZ 76.

61. Because the accident potential zones are measured from the ends of the runway, not the "primary surface," the plaintiffs' property is wholly within APZ II of runway 4-22.

62.(a) AICUZ 76 adopts and defines "approach-departure clearance surfaces." These are criteria for determining whether an object or structure is an obstruction to air navigation. These criteria discuss what would pose an obstacle if aircraft utilized the area. They do not indicate any particular amount of aircraft activity in that area.

(b) The "approach-departure surfaces" of runway 4-22 are illustrated by figure E-1 of AICUZ 76. This figure shows that the approach-departure clearance would be below 500 feet at 8,000 feet from the end of the runway. This again is unrelated to actual aircraft activity in the area.

63. AICUZ 76 shows that flight tracks 04E, 04D, 04C, 22A, 22B and 22B1, are located over the plaintiffs' property. The record does not show that these flight tracks are generally used or with what frequency.

64. The data on noise levels to which the Air Force testified, in opposition to plaintiffs' rezoning applications in January-May 1973, and their opinions that the high noise levels over the property were incompatible with the proposed gas station and bank, were based on the then current data, a study of noise levels at Plant 42 prepared by a private firm in 1970.

(b) When noise studies of Plant 42 were again done for AICUZ 1976, it was found that the property was not in fact subject to such high levels of noise. AICUZ 76 placed the property within the 65 Ldn noise contour.

(c) The underlying data for AICUZ 76 in this respect was incorrect, having been collected when runway 7-25 was closed for derubbering and runway 4-22 was receiving abnormal usage. The 65 Ldn level finding of AICUZ 1976 was accordingly later corrected in a 1978 Amendment. The amendment took the property altogether out of the noise contours for the base.

65. Under the analysis in AICUZ 1976, which placed the property in the 65 Ldn noise contour, the Air Force would not have opposed an application for a change of zone to build a bank, but it has a continuing objection to the gas station. This objection is based on an Air Force view that uses involving materials that are flammable or explosive in nature should not be located within Accident Potential Zones.

INTERMEDIATE CONCLUSIONS OF FACT AND LAW

(a) With respect to a Taking by Overflight Noise

66. The expert testimony of noise levels over plaintiffs' property, the only evidence of a taking, is not probative because it was based on overflights which are not supported by the record, on overflights at altitudes not supported by the record, on overflights not proven to have occurred at the time of the alleged taking, and, finally, because it was based on a study which took no account of the frequency of overflights by the planes whose noise levels were used, and particularly no account of frequency of overflights at less than 500 feet.

67. The record contains no probative evidence of a taking by overflights in that there is no proof of regular and frequent overflights of plaintiffs' property, and particularly of such overflights at altitudes of less than 500 feet and,

thus, no showing of any direct, immediate and substantial interference with the use and enjoyment of plaintiffs' property.

(b) With Respect to a Taking by Interference with Local Zoning Regulation

68. The Air Force committed no impropriety in the course of its participation as an affected, nearby landowner in the zoning processes of local regulatory bodies and in its opposition to plaintiffs' application for rezoning before those bodies.

69. The Air Force's participation and opposition effected no direct immediate or substantial interference with the use and enjoyment of plaintiffs' property.

(c) With respect to a Taking by Air Force Policies

70. None of the Air Force's so-called AICUZ studies, stating Air Force policies on compatibility with aircraft bases of the use of lands surrounding such bases, governed or controlled the zoning of nearby land or of plaintiffs' land.

71. None of the AICUZ studies effected a direct, immediate or substantial interference with the use and enjoyment of plaintiffs' property.

CONCLUSION OF LAW

Upon the findings and foregoing opinion, which are adopted by the court, the court concludes as a matter of law that plaintiffs are not entitled to recover and the petition is dismissed.

APPENDIX B.

Order.

In the United States Court of Claims, No. 546-76.

Robert J. Gilliland, Mary P. Gilliland, James S. Gilliland and Frank M. Gilliland v. The United States.

Inverse Condemnation By Noise — By Zoning Interference — By Regulation.

Michael M. Berger, for plaintiff. *Jerrold A. Fadem*, attorney of record. *Fadem, Begerr & Norton*, of counsel.

James E. Brookshire, with whom was *Assistant Attorney General Carol E. Dinkins*, for defendant. *Anthony C. Liotta*, *Peter D. Coppelman* and *Captain John R. Wittenborn*, United States Air Force, of counsel.

Before BENNETT, *Judge*, Presiding, COWEN, and LARAMORE, *Senior Judges*.

PER CURIAM: This case comes before the court on plaintiffs' exceptions to the recommended decision of Trial Judge David Schwartz, filed September 25, 1980, pursuant to Rule 134(h), having been submitted to the court on the briefs and oral argument of counsel. Since the court agrees with the trial judge's recommended decision, copies of which have been furnished to the parties, it hereby affirms and adopts the decision as the basis for its judgment in this case. Accordingly, it is concluded that plaintiffs are not entitled to recover, and

IT IS THEREFORE ORDERED that plantiffs' petition is dismissed.

Dated: June 12, 1981.

APPENDIX C.

Order.

In the United States Court of Claims. October 2, 1981.

PER CURIAM: IT IS ORDERED that the motions of the parties, as set forth below, for rehearing *en banc*, rehearing, reconsideration, to alter, amend or vacate judgments and orders of the court and relief therefrom, or for other relief pursuant to Rules 7(d), 151(b) and 152 are DENIED:

* * *

546-76 Robert J. Gilliland, et al.

Plaintiffs' suggestion for rehearing *en banc* (By the SEVEN ACTIVE JUDGES of the court) and plaintiffs' motion for rehearing, filed June 29, 1981. (By COWEN, *Senior Judge*, BENNETT and SMITH, *Judges*) [Orders of June 12, 1981 and June 16, 1981].

APPENDIX D.

Appeal.

In the Court of Appeal of the State of California, Second Appellate District, Division One.

Robert J. Gilliland, Plaintiff and Appellant, vs. The City of Palmdale, a municipal corporation, Defendant and Respondent. 2d Civ. No. 59028, Super. Ct. No. C107092.

Filed December 7, 1981.

APPEAL from judgment of the Superior Court of Los Angeles County. Thomas W. Le Sage, Judge. Affirmed.

Fadem, Berger & Norton, Michael M. Berger, for Appellant.

Kostas & Epson, James S. Kostas, for Respondent.

Plaintiff appeals from a judgment on the pleadings without leave to amend. Our review of such a judgment is controlled by time-honored rules of law. A motion for judgment on the pleadings performs the function of a general demurrer (*Tiffany v. Sierra Sands Unified School Dist.* (1980) 103 Cal.App.3d 218, 222): it tests the sufficiency of the complaint to state a cause of action. (*Id.*, at pp. 224-225.) Like a demurrer it is confined to the face of the pleading under attack and admits all material and issuable facts pleaded. (*Id.*, at p. 225.) Accordingly, we shall assess the legal adequacy of the following facts drawn from plaintiff's complaint and accepted as true.

FACTUAL BACKGROUND

In 1965 plaintiff became the owner of five acres of vacant land in the defendant City of Palmdale (hereafter the property) which were located in the path of a takeoff and approach runway at Air Force Plant 42, a joint civilian-military airport. At the time that plaintiff acquired the property it was zoned "A-2." According to the Palmdale zoning ordinance, of which we take judicial notice (Evid. Code,

§ 452 (b); *Baillargeon v. Dept. of Water and Power* (1977) 69 Cal.App.3d 670, 676), the classification A-2 was "established for use on land suited for agricultural purposes and other open land uses. . . . [t]he basic intent of this Zone [is] to encourage and support the development of agricultural pursuits. To further this purpose limitations are imposed on incompatible and conflicting urban uses." (Ord. No. 140, ch. 3, art. 32, zone A-2, § 32.01). Permissible uses of the land thus zoned include: one-family dwellings; animal hospitals, schools and kennels and veterinary offices; youth camps and other camp grounds; crops; auction grounds; stock breeding and yards; riding academies and stables. The A-2 zoning category functioned as a holding zone, so-called, such that applications for a zone change from A-2 were subject to particularly careful and detailed scrutiny in respect of the uses that would occur under the change.

In January 1973 plaintiff applied to the Palmdale Planning Commission for a zone change to a "commercial planned development" zone. On January 19, 1973, the Planning Commission voted five to zero in favor of plaintiff's requested zone change. On May 11, 1973, plaintiff's request was heard before the Palmdale City Council. A representative of Air Force Plant 42 and a representative of the civilian contractors at Air Force Plant 42 testified in opposition to plaintiff's requested zone change. The City Council voted three to one against plaintiff's requested zone change based on the proximity of the property to runways at Air Force Plant 42. As a result of the City's refusal to rezone his property as requested, plaintiff suffered damages of more than $325,000.

On April 15, 1975, plaintiff filed in superior court an "amended complaint for inverse condemnation," alleging all the above facts which we accept as true for purposes of reviewing the judgment. Plaintiff further alleged that his

private property had "been unlawfully taken and damaged for public use without just compensation and without due process and equal protection of the laws to which [he was] entitled by the United States and California Constitutions." The complaint contained additional conclusionary allegations which we discount as surplusage.[1] (*Agins v. City of Tiburon* (1979) 24 Cal.3d 266, fn.2 (dis. opn. Clark, J.); *Hecton v. People ex. rel. Dept. of Transportation* (1976) 58 Cal.App.3d 653, 657; *6th Camden Corp. v. Evesham Tp., Burlington Cty.* (D.N.J. 1976) 420 F.Supp. 709, 720.)

On March 14, 1979, the California Supreme Court decided *Agins v. City of Tiburon, supra,* 24 Cal.3d 266, and held that the remedy of inverse condemnation was not available to a landowner aggrieved by the negative impact of a zoning regulation on his property rights. Such a plaintiff was limited, the court held, to mandamus or declaratory relief to redress the government's excessive exercise of its police power to regulate land use. On the plaintiff's action for declaratory relief, the court held as a matter of law that

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[1]Paragraphs 13, 15 and 16 alleged, *inter alia,* that the refusal was for the purpose of devoting the property to public use as a clear zone; that plaintiff had been deprived of the beneficial and only economically feasible use of his property; that the City intended a *de facto* transformation of the property into public property without paying just compensation. We discount the allegations of motive implicit in these paragraphs on the further ground that " '. . . the purpose or motive of the city officials in passing an ordinance is irrelevant to any inquiry concerning the reasonableness of the ordinance. . . . If the conditions justify the enactment of the ordinance, the motives prompting its enactment are of no consequence.' (Citation.)" (*Pinheiro v. County of Marin* (1976) 60 Cal.App.3d 323, 327-328.) Similarly, under federal law, motive is irrelevant. " '. . . the Constitution measures a taking of property not by what a State says, or . . . intends, but by what it does.' (Citations.)" (*San Diego Gas and Electric Co. v. San Diego* (1981) ____ U.S. ____, [67 L.Ed.2d 551, 573] (dis. opn. Brennan, J.).) Thus, even if we accepted these allegations of motive as true, they would not bear on our determination of whether the challenged regulation "took" plaintiff's land.

no taking of plaintiff's land had occurred through enactment of the zoning regulation in question. (*Id.*, at pp. 277-278.)

On July 17 and 18, 1979, the motion of defendant City of Palmdale for judgment on the pleadings was argued in the trial court. On July 18, 1979, the court granted defendant's motion, noting in its minute order, "The Court, having reviewed and considered the pleadings and outline of the evidence as presented by counsel for the plaintiff, finds that there has been no taking or damaging of property."[2]

On June 10, 1980, the United States Supreme Court decided the appeal of *Agins, supra,* from the California Supreme Court and affirmed the holding that the zoning regulation in question did not take the plaintiffs' property without just compensation. (*Agins v. Tiburon* (1980) 447 U.S. 255.) But because no taking had occurred the court did "not consider whether a State may limit the remedies available to a person whose land has been taken without just compensation." (*Id.*, at p. 263.)

On June 25, 1981, plaintiff filed his opening brief in this court, announcing in his introduction, "This case seeks enforcement of rights under the U. S. Constitution (Fourteenth Amendment) and the federal Civil Rights Act (42 U.S.C. § 1983)."

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[2]The trial court's consideration of the "outline of evidence as presented by counsel for the plaintiff" was obviously impermissible when deciding the motion for judgment on the pleadings, as the motion is directed to the face of the pleading. (4 Witkin, Cal. Procedure (2d ed. 1971) p. 2817.) On review we limit ourselves to examination of the face of the pleading and affirm if the trial court was correct within that proper focus. (Cf. *Friendly Village Community Assn. Inc. v. Silva & Hill Constr. Co.* (1973) 31 Cal.App.3d 220, 224.) No doubt the trial court's consideration of the outline of evidence pertained to its decision whether to grant leave to amend, whether plaintiff could cure by amendment the defects on which the motion would be granted.

DISCUSSION OF THE LAW

Notwithstanding plaintiff filed this case six and a half years ago as a complaint for inverse condemnation, his characterization of the action on appeal is accurate. The complaint invokes plaintiff's rights under the United States Constitution and specifically alludes to rights protected by the Fifth and Fourteenth Amendments thereto. All that is required to bring a claim under the federal Civil Rights Act (42 U.S.C. § 1983) is an allegation that one has been subjected by any form of state action to the deprivation of any right secured by the Constitution of the United States.[3] (*Gomez v. Toledo* (1980) 446 U.S. 635, 640.) There is no want of federal civil rights cases in which the gravamen of the claim is a taking of private property without just compensation in violation of the Fifth and Fourteenth Amendments, such as plaintiff has asserted. (See, e.g. *Hernandez v. City of Lafayette* (5th Cir. 1981) 643 F.2d 1188; *Gorman Towers, Inc. v. Bogoslavsky* (8th Cir. 1980) 626 F.2d 607; *Barbaccia v. County of Santa Clara* (N.D.Cal. 1978) 451 F.Supp. 260; *Dahl v. City of Palo Alto* (N.D.Cal. 1974) 372 F.Supp. 647.) An action under the federal Civil Rights Act can be brought in state court (*Martinez v. California* (1980) 444 U.S. 277; *Williams v. Horvath* (1976) 16 Cal.3d 834, 837; *Brown v. Pitchess* (1975) 13 Cal.3d 518, 520-523), and can be brought against a municipality (*Monell v. Department of Social Services* (1978) 436 U.S. 658, 690.) Altogether we perceive no obstacle to treating this case on appeal as such an action.

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[3]42 U.S.C. § 1983 provides: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

When a federal civil rights action, or other federally created cause of action, is brought in state court, the vindication of that right cannot be frustrated by state law. (*Williams v. Horvath, supra,* 16 Cal.3d at 841.) In matters of substance the law of the jurisdiction creating the right will control; in other words, federal substantive case law should be applied. (Cf. *Central Vermont Railway Co. v. White* (1915) 238 U.S. 507, 511.)

Thus the chief benefit of viewing his complaint in a civil rights perspective is avoidance of the devastating effect of the California Supreme Court holding in *Agins v. City of Tiburon, supra,* 24 Cal.3d 266. Following *Agins* the remedy of inverse condemnation with its imposition of money damages no longer exists in California law. (Id., at p. 272.) A zoning regulation, no matter how unreasonable or severe its impact on a landowner's property rights, can never effect a "taking" within the meaning of the Just Compensation Clause of either the United States or California Constitutions. It must be regarded as an excessive exercise of the police power from which the injured landowner must seek relief by mandamus or declaratory action to have it set aside. (Ibid.)

California's position flatly contradicts clear precedent of United States Supreme Court cases. Although the United States Supreme Court since the California *Agins* has twice on a procedural or technical basis declined to reach the issue and resolve the conflict (*Agins v. Tiburon, supra,* 447 U.S. 255 and *San Diego Gas and Electric Co. v. San Diego,* (1981) ____ U.S. ____ [67 L.Ed.2d 551]), Justice Brennan in his dissenting opinion in *San Diego Gas and Electric,* joined by three members of the Court, has thoroughly analyzed it. Reviewing the United States Supreme Court cases on inverse condemnation, he points out that the Supreme Court regularly hears cases to settle on the particular facts

whether a taking that triggers payment of just compensation has been effected by an exercise of the police power through a zoning ordinance or other land use restriction. (Id., at pp. 572-573.) The court thus clearly assumes such a possibility. (See, e.g. *Penn Central Transportation Co. v. New York City* (1978) 438 U.S. 104; *Goldblatt v. Town of Hempstead* (1962) 369 U.S.590.) Dicta abound in these cases on the standards by which such a determination should be made. In *Agins, supra,* 447 U.S. at 260-261, for instance, the court stated, "[t]he application of a general zoning law to particular property effects a taking if the ordinance does not substantially advance legitimate state interests, see *Nectow v. Cambridge,* 277 U.S. 183, 188 (1928), or denies an owner economically viable use of his land, see *Penn Central Transp. Co. v. New York City,* 438 U.S. 104, 138, n. 36 (1978). The determination that governmental action constitutes a taking is, in essence, a determination that the public at large, rather than a single owner, must bear the burden of an exercise of state power in the public interest. Although no precise rule determines when property has been taken, see *Kaiser Aetna v. United States,* 444 U.S. 164 (1979) the question necessarily requires a weighing of private and public interests."

While Justice Brennan's conclusion — that government action in the form of a police power regulation can effect a taking just as surely as eminent domain, and the Constitution demands then that just compensation be paid — awaits another vote before it invalidates the California Supreme Court holding of *Agins, supra,* there is no question that the federal law accepts in theory the remedy of inverse condemnation with its imposition of money damages for a "taking" effected through a zoning regulation. Plaintiff herein, therefore, is not out of court on a judgment on the

pleadings for the reason that the remedy he seeks has been abolished in state law.

While plaintiff's suit remains viable under the Civil Rights Act as to the remedy it seeks, it is no less susceptible as a civil rights action to judgment on the pleadings for failure to state a cause of action, or as it is termed in federal parlance, "a claim upon which relief can be granted." (Fed. Rules Civ. Proc., rule 12(b) (6), 28 U.S.C.) Contrary to plaintiff's interpretation of the trial court's ruling as reflected in his brief arguing for application of federal law, the wording of the judgment below indicates the trial court granted the motion because the facts alleged failed to show any "taking," not because it failed to apply federal law. It is immaterial of course on what ground the trial court granted judgment on the pleadings if that was the correct decision. (*Apelian v. County of Los Angeles* (1968) 266 Cal.App.2d 550, 554, disapproved on another point in *Sullivan v. County of Los Angeles* (1974) 12 Cal.3d 710, 722.) We think it was.

We acknowledge and apply the federal policy that a civil rights pleading should be liberally construed; that ". . . a § 1983 complaint should not be dismissed unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. (Citation.)" (*Shaw v. Briscoe* (5th Cir. 1976) 541 F.2d 489, 490, cert. den. 430 U.S. 933.) We acknowledge and are willing to apply, if this were an appropriate case, the wisdom of federal "taking" cases according to which there is no "set formula to determine where regulation ends and taking begins" (*Goldblatt v. Town of Hempstead, supra*, 369 U.S. 590, 594); and the determination is one of reasonableness that entails "ad hoc, factual inquiries" (*Penn Central Transportation Co. v. New York City, supra*, 438 U.S. 104, 124), resolution of which is inappropriate on a motion to dismiss.

(*M. J. Brock & Sons, Inc. v. City of Davis*, (N.D. Cal. 1975) 401 F.Supp. 354, 358; *Dahl v. City of Palo Alto*, (N.D. Cal. 1974) 372 F.Supp. 647, 648.) Even so, plaintiff's facts, construed as liberally as possible, indeed taken as true, when evaluated by the standards that the federal cases have evolved, beyond doubt could not make out a "taking" and do not warrant a trial on the merits.

The crucial features of plaintiff's situation are that both at the time that he acquired the property and at the time that he brought the lawsuit, the property was both located in the path of the Air Force runway and zoned A-2. The only intervening government action was the City's refusal to rezone on plaintiff's request to enable him to develop the property for commercial use. If, as plaintiff interprets the situation, the City, by permitting only low density agricultural use of the property, in effect has devoted the property to the use of the Air Force or to the public as a clear zone at the end of the Air Force runway, then it had already done so when he acquired the property. The City by refusing to rezone has not deprived him of any property interest that he ever had. Rather, in a more accurate perspective, the City has refused to give him a greater property interest than he acquired.

Plaintiff's claim of a government taking under these circumstances is uniquely slim, as far as we can tell from the cases. The more familiar fact situation, in which a motion for judgment on the pleadings or to dismiss has been denied, presents the affirmative enactment of a zoning change or the adoption of a general plan by the government entity which limits the plaintiff's economic exploitation of the property affected. (See, e.g., *Sanfilippo v. City of Santa Cruz* (N.D.Cal. 1976) 415 F.Supp. 1340 [motion to dismiss denied when plaintiffs alleged that zoning of their land was changed from a residential classification permitting one res-

idence per 2.5 acres to a category permitting one residence per 100 acres and plaintiffs' subsequent application for rezoning and approval of a planned unit development was denied]; *M. J. Brock & Sons v. City of Davis, supra,* 401 F.Supp. 354 [motion to dismiss denied when plaintiff pleaded misleading and encouraging actions by defendants regarding plaintiff's development plans followed by a downzoning from high density residential to agricultural to a total ban on construction].)

In the few cases where the nature of the alleged "taking" has been the refusal to rezone land that remained zoned as it was when plaintiff acquired it, such as plaintiff has asserted herein, there were additional circumstances before the court that justified not disposing of the case without trial. In *6th Camden Corp. v. Evesham Tp., Burlington Cty., supra,* 420 F.Supp. 709, plaintiff acquired 20 acres, 17.9 of which were zoned for business and 2.1 of which, landlocked with the 17.9, were zoned residential. Plaintiff planned to construct a shopping center on the entire acreage, but defendants refused to rezone the 2.1. Plaintiff claimed the 2.1 had been rendered useless and unconstitutionally "taken" by the zoning for residential use. The court denied a motion to dismiss, even though aware that a mere diminution in value would not prove a "taking." The court took judicial notice of a state court opinion that the 2.1 acres could not feasibly be used for the permitted use. Similarly in *Hernandez v. City of Lafayette, supra,* 643 F.2d 1188, plaintiff's land had been zoned single family residential for ten years when he requested rezoning to a business or multifamily residential use. The Court of Appeals, reversing a summary judgment erroneously granted on the defendants' claim of immunity, noted that there were genuine issues of material fact whether the refusal to rezone constituted a taking because of summary judgment evidence that the land

was not feasible for the use permitted (adjacent to sewage treatment, flood plain extending across parts of it) and because of questions of good faith in defendants' processing of plaintiff's rezoning application. (*Id.*, at p. 1200.)

In the instant case there is no allegation that plaintiff's land is not suited to the uses which are permitted, nor any allegation of governmental action beyond the straightforward adherence to the agricultural zoning which came with the property. When this modest governmental action, which has deprived plaintiff if not of his property at least of his profit in the amount of $325,000, is measured against the criteria of a "taking" enunciated by the Supreme Court and applied by the lower federal courts, it appears " 'to a certainty that plaintiff is entitled to no relief under any state of facts which could be proved in support of the claim.' [Citations]." (*6th Camden Corp. v. Evesham Tp., Burlington Cty., supra,* 420 F.Supp. 709, 720, emphasis omitted.)

The criteria are two: ". . . if the ordinance does not substantially advance legitimate state interests, [citation] or denies an owner economically viable use of his land [citation]." (*Agins v. Tiburon, supra,* 447 U.S. 255, 260.) It is plaintiff's burden to prove that the ordinance meets these criteria if a "taking" by the ordinance is to be found. This is a heavy burden in view of the presumption of validity that attaches to the exercise of the public zoning authorities. (See *Burns v. City of Des Peres* (8th Cir. 1976) 534 F.2d 103, 108, cert. den. 429 U.S. 861.)

The interests of the City of Palmdale in the health and welfare of its citizens would appear to be well served by maintaining open land and low density agricultural land uses in the entire vicinity of the airport and especially in the direct path of the planes' takeoff and approach where plaintiff's property is situated. There being no allegations by plaintiff to the contrary, we find the A-2 zoning of plaintiff's

land to be a reasonable exercise of the police power to protect the community from the excessive noise, air pollution and above average safety hazards that attend the concentration of air traffic in the zoned area.

Plaintiff claims that the refusal to rezone his land for commercial development denies him the "beneficial" and "only economically feasible" use of his land. The legal question, however, is whether it denies him "economically viable use" (*Agins, supra,* 447 U.S. 255, 260) within the meaning of that concept as developed in the federal cases. It is well established that a mere "diminution in value" does not amount to such a denial. (*Goldblatt v. Town of Hempstead, supra,* 369 U.S. 590, 594; *Hadacheck v. Sebastian* (1915) 239 U.S. 394, 408-409 [diminution from $800,000 to $60,000 upheld].) Moreover, ". . . the mere fact that the regulation deprives the property owner of the most profitable use of his property is not necessarily enough . . . ." (*United States v. Central Eureka Mining Co.* (1958) 357 U.S. 155, 168.) Indeed, "[f]or there to be a taking the landowner must show he has been deprived of all reasonable uses of his land" (*C.F. Lytle Co. v. Clark* (10th Cir. 1974) 491 F.2d 834, 838); that it has been rendered valueless. (*Steel Hill Development, Inc. v. Town of Sanbornton* (1st Cir. 1972) 469 F.2d 956, 963, cert. den. 414 U.S. 932.)

Whatever conclusions plaintiff may have alleged in his complaint, he has not alleged facts that show that the A-2 zoning denies him all reasonable or "economically viable" uses, as did the plaintiff in *Hernandez v. City of Lafayette, supra,* 643 F.2d 1188; he has not alleged that the land is not suited to the uses for which it is zoned. The ordinance permits any number of uses, such as crops, livestock, animal facilities, which are not only reasonable but valuable and essential to a healthy, diversified community economy.

As analyzed by the standards of the federal "taking" cases, the A-2 zoning of plaintiff's land does not deprive him of the property rights protected in the Fifth and Fourteenth Amendments to the United States Constitution. No set of facts that plaintiff could prove would entitle him to relief under the federal Civil Rights Act.

The judgment on the pleadings without leave to amend is affirmed.

NOT FOR PUBLICATION.

JAKES, J.*

We concur:

SPENCER, P. J.

DALSIMER, J.

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*Assigned by the Chairperson of the Judicial Council.

APPENDIX E.

Appeal.

In the Court of Appeal of the State of California, Second Appellate District, Division One.

Frank M. Gilliland, Jr., et al., Plaintiffs and Appellants, v. County of Los Angeles, Defendant and Respondent. 2 Civ. No. 60960 (Super. Ct. No. C 107093).

Filed November 25, 1981.

APPEAL from a judgment of the Superior Court of Los Angeles County. Alexander R. Early III, Judge. Affirmed.

Fadem, Berger & Norton and Michael M. Berger for Plaintiffs and Appellants.

John H. Larson, County Counsel, and Paul T. Hanson, Deputy County Counsel, for Defendant and Respondent.

Plaintiffs Frank, James and Robert Gilliland appeal an order of dismissal entered after the trial court sustained without leave the general demurrer of defendant County of Los Angeles (hereinafter referred to as County) to their first amended complaint.

FACTS

The facts alleged by plaintiffs in their first amended complaint for inverse condemnation (with a prayer for declaratory relief and injunction) must on this appeal be taken as true. Plaintiffs in their first amended complaint filed September 26, 1979, allege, in substance, as follows:

That the Gillilands are and for seven years have been owners of Lots 41, 60 and 61 of Tract 7670 of Los Angeles County comprising 30 acres of vacant land; that the subject property being situated in unincorporated county territory is within the zoning and planning jurisdiction of the County; that the property is and at all times relevant has been zoned A2-5, an agricultural zone which permits two single family

residences for each five acres of land; that A2-5 is used by the County as a "holding zone" in which the County holds the land to the minimal use permitted by the zoning by withholding zone changes for a proposed new use when the owner comes to the County for a permit to put his land to its highest and best use "unless the County approves the specific proposed land use, site utilization and sometimes aesthetics of the proposed use to be made of the land"; that real property taxes have been assessed to the Gillilands not based on A2-5 uses but based on the highest and best uses for which the land is adapted; that the assessed value and real property taxes of the subject property from the time of its purchase in 1967 through the 1972-1973 tax year increased 600 percent due to increased commercial and industrial development in the surrounding area; and that as a further result of this development the Gillilands on request granted easements and dedicated portions of the subject property for purposes such as street widening, curbing and utilities.

Plaintiffs allege further that in February 1973 they applied to the County Regional Planning Commission for a zoning change of the subject property to CPD, a commercial planned development zone; that this request was on February 20, 1973, denied on the stated grounds that the property lies within the primary impact area of the proposed Palmdale Intercontinental Airport and that plaintiffs did not adequately demonstrate need for additional commercial zoning in the area; that the Gillilands appealed this decision to the County Board of Supervisors (hereinafter the Board); that on April 30, 1973, the Board heard testimony opposing the requested zone change from representatives of Air Force Plant 42 and from aircraft companies with facilities in the adjacent area, namely Lockheed, McDonnell Douglas, Rockwell International, and Northrop; that Air Force Plant

42 is an airport on which commercial manufacturing is conducted including assembly of Lockheed L 1011; and that the Board denied the Gillilands' request for a zone change based on testimony that the property is within an area that receives noise of 100 db(A) or more from Air Force Plant 42.

Plaintiffs in addition allege that by reason of the County's refusal to rezone, the Gillilands' private property has been unlawfully taken for public use without just compensation and without due process and equal protection of law under the federal and state Constitutions; that as the result of the refusal to permit commercial use the Gillilands were deprived of beneficial use, e.g., the use, enjoyment and right to develop and sell the subject property; that plaintiffs are informed and believe that the acts of the County were intended to stultify the lawful use of the Gillilands' land, to reduce its value and to render it unsaleable and unusable for any reasonable private use and to accomplish a de facto transformation of the subject land into public property without payment of just compensation; that the conduct of the County was unreasonable, unlawful, arbitrary and discriminatory; that the Gillilands have been damaged thereby in an amount in excess of $825,000; that prior to filing this action the plaintiffs filed a claim with the County which was rejected.

Plaintiffs allege further that the County took the plaintiffs' property to provide space for the approach and departure of jet aircraft to and from Air Force Plant 42; that this impressed the land with a servitude for airport use in furtherance of the County's determination of its own best interest in keeping Air Force Plant 42 operating in the County; that the County "took the use of the Gilliland's property by the agreement between the County and the U.S." and placed the use of the Gillilands' property in the United

States; that by reason of the foregoing the County's zoning ordinance is invalid as applied to the Gillilands' property; that plaintiffs have no adequate remedy at law because of *Agins v. City of Torrance* (1979) 23 Cal.3d 605; and that plaintiffs were deprived of their property without just compensation or due process of law in violation of the Fifth and Fourteenth Amendments to the United States Constitution and the Federal Civil Rights Act (42 U.S.C. §1983).

Plaintiffs on the basis of these allegations sought just compensation for the taking, damages under the Federal Civil Rights Act, declaratory judgment and injunctive relief invalidating the County's zoning ordinance as applied to the subject property and costs and expenses of litigation including attorneys' fees. Defendant County filed a general demurrer which was sustained by the trial court and plaintiffs have appealed.

ISSUE

Plaintiffs on appeal contend that the trial court erred in failing to apply applicable federal law and therefore sustaining the demurrer and dismissing their action.

DISCUSSION

The Gillilands contend that the trial court disregarded the legal authority of federal cases when it sustained the County's demurrer. It is well established that enactment of any general measure which purports to zone or rezone property is a legislative act. (*Arnel Development Co. v. City of Costa Mesa* (1980) 28 Cal.3d 511, 516; *San Diego Bldg. Contractors Assn. v. City Council* (1974) 13 Cal.3d 205.) The application of this principle has been held, in the case of a rezoning, not to constitute a denial of due process under the United States and California Constitutions. (*Arnel Development Co. v. City of Costa Mesa, supra*, 28 Cal.3d at

p. 519.) California views zoning ordinances as legislative while variances and subdivision map approvals are adjudicative. Therefore, adequate protection under state and federal constitutional requirements is fulfilled when zoning is enacted by the city council by the provisions for the landowner to have notice and hearing. When zoning is enacted by initiative, these requirements are fulfilled by the equal opportunities of those favoring and opposing the zoning to be heard by the electorate. Those affected by the zoning or rezoning also enjoy the option to obtain administrative or judicial relief in the event the zoning restriction produces arbitrary or capricious results.

In the event hardship is occasioned by zoning restrictions administrative relief is potentially available. (*Id.*, at p. 520). The landowner has "[t]he right to seek judicial invalidation of zoning which is arbitrary or unreasonable (see *Hamer v. Town of Ross* (1963) 59 Cal.2d 776, 781 [. . .]), which bears no reasonable relationship to the regional welfare (see *Associated Home Builders etc., Inc. v. City of Livermore, supra*, 18 Cal.3d 582, 609-610), or which deprives them of substantially all use of their land (see *Agins v. City of Tiburon* (1979) 24 Cal.3d 266, 273 [. . .], affd. (1980) ____ U.S. ____ [65 L.Ed.2d 106, . . .]). . . ." (*Arnel Development Co. v. City of Costa Msa, supra*, 28 Cal.3d at p. 521.)

Nonetheless zoning regulations have traditionally been sustained against constitutional attacks. (See, e.g., *Euclid v. Ambler* (1926) 272 U.S. 365, 386.) The California Supreme Court has previously held that inverse condemnation does not lie in zoning actions in which it is alleged that the market value of property is reduced. (See *HFH, Ltd. v. Superior Court* (1975) 15 Cal.3d 508.)

Therefore, the enactment by a city of a zoning ordinance reducing the density of approved development on an owner's

land, does not constitute a taking without just compensation in violation of the Fifth and Fourteenth Amendments which would support an action in inverse condemnation. (*Agins v. Tiburon* (1980) 447 U.S. 255.) The United States Supreme Court in *Agins* affirmed the holding of the California Supreme Court that the zoning ordinance on its face did not constitute a taking without just compensation (*Agins v. City of Tiburon* (1979) 24 Cal.3d 266). The California decision in *Agins* held that a landowner who challenges the constitutionality of an ordinance may not sue in inverse condemnation and thereby transmute an excessive use of the police power into a lawful taking for which compensation in eminent domain is required. (See also the discussion relative to monetary compensation in *San Diego Gas & Electric Co. v. San Diego* (Mar. 24, 1981)* ____ U.S. ____.)

In the case at bench, just as in *Agins*, the zoning ordinance does not on its face take plaintiffs' property with out just compensation. The Gillilands do not allege that the ordinance on its face deprives them of substantially all use of the land. It is clear from a reading of the ordinance describing A2-5 zoning that there are many uses to which the land may be put in addition to residential use.

The specific zoning regulations here at issue constitute exercise of the city's police power to protect local residents from the adverse effects of urbanization in specifying low density where the noise level is high. (See, e.g., *Agins v. Tiburon, supra*, 447 U.S. 255, 261.) Although this is the result of the proximity of the airport, this exercise of the police power does not constitute a taking compensable in damages.

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*Advance Report Citation: 49 U.S.L.Week 4317.

In any event, in California the remedy of inverse condemnation is not available in these circumstances and declaratory relief or mandamus is the sole means of relief. We note that here, just as in *Agins*, the Gillilands do not allege that they have submitted to the County a plan to use or to improve their property according to the manner permitted by zoning regulations; or that such a plan has been rejected. Consequently, there is as yet apparently no circumstance which has generated a concrete controversy regarding the application of the specific zoning provisions. (*Agins v. Tiburon, supra*, 447 U.S. at p. 260.) In view of this circumstance, there is no ground for declaratory relief.

By a parity of logic, mandamus has not been effectively pleaded by the Gillilands since they allege that they sought a zone change rather than a building permit or variance or conditional use permit. Since zoning, as we have pointed out, is a legislative act, mandamus is not an appropriate remedy in the case at bench. (*Toso v. City of Santa Barbara* (1980) 101 Cal.App.3d 934, 942; *City Council of Santa Barbara v. Superior Court* (1960) 179 Cal.App.2d 389, 396-399.)

Finally, since the ordinance is constitutional on its face and there is no allegation of a threatened harmful act by the County, the complaint does not allege facts which would support an injunction.

The Gillilands in their brief concede that they have no remedy at law under these circumstances by virtue of the legal principles enumerated in *Agins* which limit their remedies. They have, therefore, sought to set forth a claim for damages under the federal Civil Rights Act (42 U.S.C. § 1983). That statute, in substance, merely establishes that a remedy is available when any person, under color of state law, deprives the complaining party of rights, privileges, or immunities secured by federal law. The right to just

compensation for a governmental taking of private property arises not from the federal Civil Rights Act but from the protections of the Fifth and Fourteenth Amendments. However, the California Supreme Court in *Agins* held that monetary damages constituted an inappropriate remedy for an alleged taking which was the result of local land-use regulation expressing concern with the chilling effect such awards might have on the proper exercise of the police power. (*Agins v. City of Tiburon, supra*, 24 Cal.3d 266, 276-277.) In view of that decision, the remedy of monetary damages would be unavailable in any event, whether the action were brought in inverse condemnation or under the federal Civil Rights Act. Since it does not appear that there was any taking in this case, the distinction is immaterial.

Ultimately, the Gillilands fail to allege facts which constitute an actual taking of property. An owner of undeveloped land, such as the acreage in the case at bench, has no vested right in existing zoning. (*Avco Community Developers, Inc. v. South Coast Regional Com.* (1976) 17 Cal.3d 785, 791.) A fortiori, the owner can have no vested right in more valuable zoning which he may have anticipated in the future and which would be different from that in effect at the time he became the owner. (*HFH, Ltd. v. Superior Court, supra*, 15 Cal.3d 508, 516.) There is, furthermore, no right to have real property zoned for its highest and best use. (*Ibid.*) The allegations that representatives of the U.S. Air Force and aircraft companies with facilities in the adjacent area testified opposing the requested zone change contributes nothing with respect to the causes of action the Gillilands attempt to state since neighboring landowners are entitled to present their views at a hearing on rezoning. (See *N.B.H. Land Co. v. United States* (Ct. Cl. 1978) 576 F.2d 317, 318-319.)

In summary, the Gillilands essentially allege that their property would have a higher monetary value if it were rezoned commercial. Such circumstances are insufficient to support a cause of action for a zoning change. (*Village of Euclid v. Ambler Realty Co.* (1926) 272 U.S. 365. 384-385.)

DISPOSITION

The judgment (order of dismissal) is affirmed.

HANSON (Thaxton), J.

We concur:

SPENCER, P. J.

LILLIE, J.

NOT TO BE PUBLISHED

Opposition

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FILED
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No. 81-1242

In the Supreme Court of the United States

OCTOBER TERM, 1981

ROBERT J. GILLILAND, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Court of Claims was correct in its holding that the evidence was insufficient to establish a taking of petitioners' property under the standard established by this Court in *United States* v. *Causby*, 328 U.S. 256 (1946).

2. Whether the United States can be estopped from claiming that overflight conditions concerning petitioners' property were different in 1978 than in 1973, when there is no showing either that (1) the 1973 description was intended to induce petitioners to take any action, or (2) petitioners took any action in reliance on this description.

TABLE OF CONTENTS

Page

Opinion below 1

Jurisdiction 1

Statement 1

Argument 5

Conclusion 8

TABLE OF AUTHORITIES

Cases:

Griggs v. *Allegheny County*, 369 U.S. 84 5

Hampton v. *Paramount Pictures Corp.*, 279 F. 2d 100 7

Moser v. *United States*, 341 U.S. 41 6

United States v. *Causby*, 328 U.S. 256 ..... 5, 6

United States v. *Georgia-Pacific Co.*, 421 F. 2d 92 6-7

United States v. *Lazy FC Ranch*, 481 F. 2d 985 6

Statute and rule:

United States Constitution, Fifth Amendment 5

Ct. Cl. R. 143 5

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OPINION BELOW

The opinion of the United States Court of Claims (Pet. App. 31) is unreported. The recommended decision of Trial Judge David Schwartz (Pet. App. 1-30) is also unreported.

JURISDICTION

The judgment of the United States Court of Claims was entered on June 12, 1981. Petitioners' timely motion for rehearing and suggestion for rehearing *en banc* were denied on October 2, 1981 (Pet. App. 32). The petition for a writ of certiorari was filed on December 30, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1255(1).

STATEMENT

1. Petitioners own 33 acres of land situated close to Plant 42, an Air Force Base near Palmdale, California, at which various civilian contractors "assemble and test-fly aircraft for the Air Force" (Pet. App. 1). The base has two active runways, an east-west runway (07-25) and a northeast-

southwest runway (04-22). Petitioners' property is located along a hypothetical extension of the centerline for Runway 4-22, 8,300 feet off the southwest end of that runway (Pet. App. 6-7). Runway 4-22 "has no lights, no instrument landing system, a washboard-like surface, and is mainly used by the lighter aircraft, usually the fighters" (*id.* at 6). Its counterpart, Runway 7-25, is equipped with an instrument landing system and night lights and carries the base's heavier traffic (*ibid.*).

Petitioners contend that overflights occasioned by the following aircraft "took" the "use or enjoyment of their property": B-1 Intercontinental Strategic Bomber, SR-71, F-5, F-86, and F-89 (Pet. App. 7, 9). These aircraft allegedly flew on one of three dates which petitioners considered particularly relevant: B-1, 1978; SR-71, F-5, 1973; F-86, F-89, 1953 (*id.* at 7). They alleged that overflights of these aircraft took their property as of 1973. At trial, however, the aircraft noise descriptor used by petitioners' expert ("perceived noise level system," PNLS) took no account of the frequency of overflights — for that matter, of whether any of the targeted aircraft actually flew over petitioners' property (*id.* at 8, 9). Similarly, it was demonstrated that there were no flights over the property at less than the minimum safe altitude of flight—500 feet above ground level (AGL) (*ibid.*).

2. The property lies partially within the jurisdiction of the City of Palmdale and the County of Los Angeles. It was zoned "A2-5," or agricultural, from the time petitioners acquired the property in 1966 (5 acres) and 1967 (28.3 acres) until trial in 1979 (Pet. App. 11, 12). Each of the two parcels comprising petitioners' property lies within one mile of Plant 42. That fact is a matter of relevance because, when the Air Force acquired Plant 42 in 1952, the County adopted a resolution providing that it would make no zoning

changes for property within one mile of the base without first apprising the Air Force of the suggested changes (*id.* at 11).[1]

In January 1973, petitioners sought a zoning change for both parcels of land from "A2-5" to "Planned Commercial Development (PCD)" (Pet. App. 12). On April 26, 1973, the County Board of Supervisors approved the recommendation of the Los Angeles Regional Planning Commission that the application be denied (*id.* at 16-17). Later, on May 11, 1973, the Palmdale City Council voted, 3 to 1, to deny the application (*id.* at 17). The Court of Claims found no evidence that petitioners "sought any further review of the denial of the application for rezoning" (*ibid.*).

Air Force representatives actively participated in the public zoning proceedings. Prior to the City's May 11 vote, the Palmdale Planning Commission had considered the application at a January 19, 1973, meeting. At that meeting, Plant 42's Civil Engineer presented the Air Force's objections to the application.[2] Nonetheless, the Commission approved the application by a vote of 5 to 0 (Pet. App. 12-13). Captain Robert Suelzle, Chief of Plant 42, wrote to

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[1]In 1962, the City adopted the County's zoning ordinance as its own (Pet. App. 11).

[2]The Air Force's written statement objected as follows (Pet. App. 12-13):

> 1. Entire area around AF 42 was zoned A-2 and the County had always respected Air Force opinion on zoning changes;
>
> 2. It was understood that the City would continue the policy;
>
> 3. Air Force and City studies showed the area to have a sound rating of 100+ decibels;
>
> 4. Present opinion and OSHA suggested that hearing protection be worn in levels of 80+ decibels; and,
>
> 5. The property was near the runway on a centerline extension and "safety must be considered as evidenced by the recent 'Ice Cream Parlor' accident in Sacramento."

both the City Council and the County Planning Commission protesting the application. He requested that rezoning on this land within a "high noise" area await "complete and thorough environmental impact studies" (*id.* at 13). On April 23, 1973, City officials met with Air Force Brigadier General Nunn concerning petitioners' application as well as Air Force policy and planning for guidance to municipalities on rezoning near Air Force bases (*id.* at 15). On the same date, Nunn wrote both the City and County Board of Supervisors[3] (*ibid.*).

Suelzle also attended a County Planning Commission meeting on February 13, 1973, and "stated, among other things, that 'the subject property lies in a 100 Db noise level area' and that 'the Air Force has no intention of closing or abandoning Runway 4/22' " (Pet. App. 13).

3. The trial judge of the Court of Claims concluded "that none of [petitioners'] claims [had] any merit in fact" (Pet. App. 1).[4] He found "no evidence" of frequent flights, of low flights, or of overflights (*id.* at 3). Turning to petitioners' claim of a zoning-related taking, the trial judge concluded that Air Force participation had involved no improprieties (*ibid.*).

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[3]Nunn's letter noted that the property was "within the 100 decibel sound zone" and "directly off a runway being used by aircraft undergoing initial flight testing—a hazardous operation" (Pet. App. 15-16).

[4]At trial, petitioners also contended that an Air Force informational process known as AICUZ, Air Installation Compatible Use Zone, was such an "extensive and intrusive" regulation as to effect a taking.

The AICUZ studies were "intended to provide land use guidelines to be recommended by base commanders to communities for use in the land use planning and control process" (Pet. App. 25). Those studies:

> analyze noise and accident potential at the particular base and identify land use for specific areas near the base which would be compatible with the air operations conducted thereon.

Ibid. The trial judge concluded that AICUZ studies did not govern or control the zoning of petitioners' property and did not effect a direct,

4. Petitioners excepted, pursuant to Rule 143, Ct. Cl. Rules, to the trial judge's recommended decision. The questions presented to the Court of Claims were essentially the questions now presented to the Court. Petitioners argued that the Air Force, by participating as it did in local zoning considerations, had admitted the elements of a conclusive taking. Further, they contended that the United States should be estopped from denying those admissions. Since the court "agree[d] with the trial judge's recommended decision," it affirmed and adopted that decision and dismissed the petition (Pet. App. 31).

ARGUMENT

The decision below is correct and does not conflict with any decision of this Court or of any other court. Review by this Court is not warranted.

1. There is no merit to petitioners' argument that the Court of Claims ignored clear and convincing evidence that the Air Force's flights over their property have so restricted their use of it as to constitute a taking within the meaning of the Fifth Amendment requiring compensation. Petitioners' sole basis for this argument[5] is that the government's 1973 statements opposing their request for a zoning change for their property constitute sufficient evidence to establish a taking under this Court's decisions in *Griggs* v. *Allegheny County*, 369 U.S. 84 (1962), and *United States* v. *Causby*, 328 U.S. 256 (1946) (Pet. 5-9).

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immediate or substantial interference with the use and enjoyment of plaintiffs' property (*id.* at 30).

On their exceptions to the Court of Claims, petitioners abandoned this argument.

[5]Petitioners have not challenged the trial court's finding that the direct evidence they presented at trial was insufficient to establish that a taking had taken place.

Even accepting petitioners' premise that the government is bound by those representations, however, no taking has been established. In *Causby* this Court held that flights over private land can constitute a taking, but not "unless they are so low and so frequent as to be a direct and immediate interference with the enjoyment and use of the land." *United States* v. *Causby, supra*, 328 U.S. at 266. There is nothing comparable here.

As described above, petitioners acquired one parcel of the land in 1966 and the other in 1967. At that time it was zoned "agricultural" and was subject to a County resolution (adopted in 1952) that no zoning changes would be made for property within one mile of Plant 42, without giving the Air Force an opportunity to comment on the proposed change. The statements which petitioners claim establish a taking were made in 1973[6] when petitioners sought a zoning change for their property to "Planned Commercial Development." But petitioners do not allege, and the Air Force's 1973 statements do not establish, that there has been any interference with the uses for which their land was approved when they purchased it. They can hardly claim that their property has been taken merely because permission to rezone it for new uses was denied.

2. At all events, the statements made by the Air Force in 1973 cannot estop the government from introducing evidence of changed conditions five years later.

It may be assumed that "the estoppel doctrine is applicable to the United States where justice and fair play require it." *United States* v. *Lazy FC Ranch*, 481 F. 2d 985, 988 (9th Cir. 1973), citing *Moser* v. *United States*, 341 U.S. 41, 47 (1951). In order for the doctrine to be applied against any party, however, "[f]our elements must be present * * *: (1)

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[6]See trial court findings nos. 23, 24, 25, 28 and 30 (Pet. App. 12-16).

[t]he party to be estopped must know the facts; (2) he must intend that his conduct shall be acted on or must so act that the party asserting the estoppel has a right to believe it is so intended; (3) the latter must be ignorant of the true facts; and (4) he must rely on the former's conduct to his injury." *United States* v. *Georgia-Pacific Co.*, 421 F. 2d 92, 96 (9th Cir. 1970), quoting *Hampton* v. *Paramount Pictures Corp.*, 279 F. 2d 100, 104 (9th Cir. 1960). Those conditions are not satisfied here.

Petitioners have shown nothing more than that the Air Force in this case gave evidence indicating that conditions concerning overflights of their property were different in 1978 than they had been in 1973. They have not shown that either description was inaccurate when made, or, more importantly, that the 1973 representations were (1) intended to induce petitioners to take any action or (2) that they took any action in reliance upon these representations. Thus, petitioners have failed to establish even a *prima facie* case justifying application of estoppel against the United States in this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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Petitioner's Reply Brief

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No. 81-1242

IN THE

Supreme Court of the United States

October Term, 1981

ROBERT J. GILLILAND, MARY P. FITZ, JAMES S. GILLILAND and FRANK M. GILLILAND,

Petitioners,

vs.

THE UNITED STATES,

Respondent.

PETITIONERS' REPLY BRIEF.

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TABLE OF AUTHORITIES

Cases	Page
A.J. Hodges Indus., Inc. v. U.S. (Ct. Cl. 1966) 355 F. 2d 592	3
Drennen v. County of Ventura (1974) 38 Cal. App. 3d 84, 112 Cal. Rptr. 907	3
Gilliland, et al. v. City of Palmdale and County of Los Angeles No. 81-....	2, 3
Hernandez v. City of Lafayete (5th Cir. 1981) 643 F. 2d 1188	3
Hinman v. Pacific Air Transport (9th Cir. 1936) 84 F. 2d 755	3
San Diego Gas & Elec. Co. v. City of San Diego (1981) 450 U.S. 621	4
Smart v. City of Los Angeles (1980) 112 Cal. App. 3d 232, 169 Cal. Rptr. 174	3
United States v. Causby (1946) 328 U.S. 256	1, 2, 3

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PETITIONERS' REPLY BRIEF.

The brief filed by the United States offers this Court little assistance. That brief compresses the facts to the point of obscurity, oversimplifies the issues, and misconstrues pertinent authority.

First. The United States claims there is no evidence to demonstrate a ". . . direct and immediate interference with the enjoyment and use of the land . . .", as there was in *United States v. Causby* (1946) 328 U.S. 256, 266 (Br. in Opp. 6).

Contrarily, the facts admitted by the United States at the zone change hearings (findings 23, 24, 25, 28, 30 [App. 12-16]) show noise so loud that ear protection would be required even indoors (finding 23 [a][4]), and flight activity hazardous enough to liken the potential situation to an aircraft crash in Sacramento which killed more than a dozen children at a birthday party (findings 23 [a][5], 28 [b][ii]).

Such activity is as direct and immediate an interference with use of the property as can be imagined. Who would — or could — use such property?

Second. The United States asserts that there is no indication that the severe noise and crash hazard interfere with any use for which the property was zoned when it was purchased (Br. in Opp. 6).

Wrong. The pertinent zoning ordinances are attached as Appendices M and N to the Jurisdictional Statement in the companion case of *Gilliland, et al. v. City of Palmdale and County of Los Angeles*, No. 81-.... (being filed concurrently).* Those ordinances show the following permitted uses, inter alia: single family residences, children's day care centers, homes for the aged, animal hospitals, campgrounds, youth hostels, schools, churches, convents and monasteries, hospitals, libraries, mobilehome parks and drive-in theatres. Plainly, none of these uses is compatible with jet noise loud enough to require ear protection indoors and serious hazard of a jet crashing on the property.

Legally, the United States is in error in examining the impact of its noise only on the use being made of the property in 1966-1967 (Br. in Opp. 6). In *Causby*, this Court noted:

> "It is the owner's loss, not the taker's gain, which is the measure of the value of the property taken. [citation] Market value fairly determined is the normal measure of the recovery. [citation] And that value may reflect *the use to which the land could readily be converted, as well as the existing use*. [citation]" (328 U.S. at 261; emphasis added.)

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*In the Petition herein (pp. 3-4), the property owners advised this Court of the imminent arrival of that appeal and asked that consideration of this case await the companion. As anticipated, the companion case is now ready for this Court's review.

Likewise, see *A.J. Hodges Indus., Inc. v. U.S.* (Ct. Cl. 1966) 355 F. 2d 592, 600, where damages were awarded in an airport noise case because agriculturally used land was robbed of its potential for conversion to a residential subdivision.

Moreover, as flights of aircraft over vacant land do not interfere with the land, the time to examine the impact of the aircraft noise and hazard is when use is proposed for the property. (*Hinman v. Pacific Air Transport* [9th Cir. 1936] 84 F. 2d 755 [cited with approval by this Court in *Causby*, 328 U.S. at 264]; *Drennen v. County of Ventura* [1974] 38 Cal. App. 3d 84, 112 Cal. Rptr. 907; *Smart v. City of Los Angeles* [1980] 112 Cal. App. 3d 232, 169 Cal. Rptr. 174.)

Third. There is no support for the United States' ipse dixit that:

> "They can hardly claim that their property has been taken merely because permission to rezone it for new uses was denied." (Br. in Opp. 6)

If the refusal to rezone amounts to a taking of property for public use because it denies the property owner any viable use for his land, compensation is mandated. (E.g., *Hernandez v. City of Lafayette* [5th Cir. 1981] 643 F. 2d 1188.) Indeed, that is the issue presented by the appeal in the companion case, *Gilliland v. City of Palmdale and County of Los Angeles*, No. 81-.... .

Fourth. The United States evades the issue by asserting that:

> "At all events, the statements made by the Air Force in 1973 cannot estop the government from introducing evidence of changed conditions five years later." (Br. in Opp. 6)

No one disputes the right of the United States to demonstrate that conditions have changed. But that is not the

issue. The evidence shows without contradiction — through admissions of the United States — that at least from 1970 to 1978 there was extremely loud noise and a great hazard of potential crashes. If conditions changed in 1978, then perhaps the taking ended in 1978. But damages for the period *before* the changed conditions are constitutionally mandated. (See *San Diego Gas & Elec. Co. v. City of San Diego* [1981] 450 U.S. 621, 656 [Brennan, J., dissenting procedurally, but apparently expressing the substantive views of at least five Justices].)

Finally. The United States errs in its discussion of estoppel by asserting that its statements were not intended to induce the *owners* to act and the *owners* did not act in reliance thereon (Br. in Opp., p. 7). The United States clearly intended for its representations to induce action by Palmdale and the County adverse to the owners. Just as clearly, such action was taken, based on the United States' representations. By seeking to escape from the consequences of its actions on the assertion that the City zoning action was not in reasonable reliance on the evidence produced by the United States, the government ignores the reality of a small town's reliance on what the United States of America says. Presentations by a Deputy Assistant Secretary of the Air Force and a Brigadier General preceded the formal appearance before the City Council (findings 28, 30 [App. pp. 14-16]).

In any event, the property owners, as well as the City and County, reasonably relied on the Air Force evidence. The detriment has been no ability to use the property since 1973.

The issues presented are important. The failure of the United States to come to grips with them is a concession that the result below was erroneous.

The Gillilands and Mrs. Fitz pray that this Court grant certiorari.

Respectfully submitted.

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